No. 79-236

In the

Supreme Court of the United States

TERM, 1979

PLACID OIL COMPANY,

Petitioner,

v.

THE FEDERAL ENERGY ADMINISTRATION AND JOHN F. O'LEARY, ADMINISTRATOR (NOW THE DEPARTMENT OF ENERGY AND JAMES R. SCHLESINGER, SECRETARY OF ENERGY),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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Miscellaneous

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PLACID OIL COMPANY hereby petitions for a Writ of Certiorari to review the Judgment of the Temporary Emergency Court of Appeals entered on July 13, 1979, which affirmed a decision of the United States District Court for the Northern District of Texas.

ORDERS AND OPINIONS BELOW

The decisions and orders of the Federal Energy Administration (FEA), from which Placid appealed to the District Court are reported at 3 FEA ¶ 83,158 (April 9, 1976) and 4 FEA ¶ 80,534 (September 8, 1976), and are found at A-73 and A-91, respectively. The FEA decision overruling Placid's final administrative Motion for Rehearing is apparently not

reported but is found at A-99. The decision of the District Court is reported at 465 F.Supp. 1199 (A-105). The decision of the Temporary Emergency Court of Appeals is as yet unreported (A-131).

JURISDICTION

The decision and Judgment of the Temporary Emergency Court of Appeals was entered on July 13, 1979 and this Petition for Certiorari is filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and § 211(G) of the Economic Stabilization Act, as amended, 12 U.S.C. § 1904 note (1973).

QUESTIONS PRESENTED

1. Whether the courts below applied erroneous standards for review of an administrative denial of exception relief where the denial was alleged to be a deviation from administrative precedent.

2. Whether the FEA's deviation from administrative precedent was arbitrary and discriminatory because it was not based upon (a) clearly explained factual distinctions (b) supported by substantial evidence (c) having regulatory significance (d) without reference to post-hoc rationalizations.

3. Whether the imposition of standards for review which are different from those applicable to any other federal agency, impose virtually impossible burdens upon petitioners before the agency (including Placid) and permit discrimination between such petitioners based on immaterial facts, deny meaningful appellate review contrary to the intent of Congress.

4. Whether the courts below improperly refused to address the constitutional issue raised by Placid.

5. Whether the courts below, contrary to decisions of this Court, improperly refused to address the continuing validity of the FEA regulation in question.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall private property be taken for public use, without just compensation.

The Supplier/Purchaser Rule (the December 1 Rule), 10 C.F.R. § 211.64 (1974), is set forth at A-1.

The Buy/Sell Rule for the years 1974, 1976 and 1978, 10 C.F.R. § 211.65, are set forth at A-2 — A-29.

STATEMENT OF THE CASE

Placid's grievance is an easy one to state. Due to certain regulations promulgated by the FEA, Placid is forbidden from using its own oil production in the refinery owned by its wholly-owned subsidiary, Placid Refining Company. In order to provide the feedstock for its refinery, it is required to purchase oil from other companies (to some of which companies Placid is required to sell by the FEA), and to pay for such oil a price not only in excess of what it could furnish the oil for itself, but a price in excess of the national average.

The administrative record reflects that Placid is the only company in the United States in this patently absurd position.

Placid seeks only to use its own oil in its own refinery. It has sought relief from this predicament both administratively and judicially. Although the facts of its case fall precisely within the guidelines for exception relief previously

laid down by the FEA, although the relief sought has been granted to others, and although the FEA adduced no evidence to counter Placid's contention[5], Placid has been denied all relief.

1. The Regulatory Scheme and Administrative Proceedings

Placid will here undertake a plain language explanation of the regulatory scheme which has led to this case.

In response to the crude oil supply shortage which was precipitated by the Arab oil embargo in 1973, Congress passed the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751, *et seq.* This act was, at that time, truly an emergency measure and was scheduled to expire in February, 1975. Pursuant to the EPAA and in an apparent effort to stabilize crude supplies to small refiners during the period of the crisis, the FEA devised two regulatory programs known, generally, as the "supplier/purchaser program," 10 C.F.R. § 211.64 (1974), (A-1) and the "buy/sell program" 10 C.F.R. § 211.65 (1974) (A-2). The first of these programs was designed to require "suppliers" of oil to continue selling the same amounts of oil, on the same terms, to "purchasers," and the second program required certain large refiners which had ample crude oil supplies to make available a portion of those supplies to small refiners. Since the latter, or "buy/sell program," was mandating the creation of new contractual relationships, it specified terms on which these new relationships would be formed.

Both these programs were to expire with the expiration of the underlying statute in February, 1975.[1] However, in

[1] 15 U.S.C. § 751, *et seq.* (1976)

December, 1974 the Congress extended the enabling statute to August 31, 1975 and subsequently extended it to September 30, 1981.[2] Now, of course, the FEA has been replaced by what appears to be a permanent government department, the Department of Energy, headed by a new Cabinet member, the Secretary of Energy.[3]

With each extension of the enabling statutes, the regulations have been likewise extended. Throughout its existence, the "buy/sell program" has been from time to time altered. For example, it originally required the buyer to pay to the seller the average cost of the large refiner/seller's crude oil, transportation, gravity differentials, and a handling charge of $.30 per barrel. In March, 1976, the program was amended to reduce the handling charge to $.05 per barrel, but to increase the base price of the crude oil to the average cost of the refiner/seller's *imported* crude oil. Still more recently, the program was amended to limit access to buy/sell oil to those refiners unable to obtain imported crude oil and to alter the base price to the average cost of the refiner/seller's imported high-sulfur or low-sulfur crude oil depending on the type of oil purchased.

The "supplier/purchaser program," on the other hand, has remained essentially unchanged since its original promulgation on January 15, 1974. The keystone of that program is what is known as the "December 1 Rule." That Rule provides that all contracts for the sale of crude oil which were in effect on December 1, 1973, regardless of their original terms, must remain in effect for the duration of the FEA's regulatory program.

[2] 15 U.S.C. §§ 751, 753(g)(1) and 753 notes; Pub.L.94385, 90 Stat. 1125 (1976)

[3] 42 U.S.C. § 7101 *et seq.* (1976)

It is the interaction of these two FEA programs which has led to Placid's present quandary.[4]

Pursuant to 10 C.F.R., Part 205, Subpart D — "Exception," Placid sought relief from the "December 1 Rule." In short, it requested that it be allowed to return to the original terms of the contracts governing the sales of its crude oil on December 1, 1973. In practical effect, since many of such contracts had, by their terms, long since expired and others would subsequently, Placid would, if relief were granted, be permitted to use its own oil in its own refinery.

Placid's application was denied (A-73), as was its administrative appeal (A-91).

2. Judicial Proceedings Below

Placid instituted this suit in the United States District Court for the Northern District of Texas, Dallas Division, Patrick E. Higginbotham, J., pursuant to the jurisdiction conferred therein by reason of 28 U.S.C. § 1331, § 7(i) (2) (B) and 8(f) of the Federal Energy Administration Act of 1974, 15 U.S.C. §§ 766(i) (2) (B) and 767(f) and § 5(a) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a), which incorporates by reference § 211(a) of the Economic Stabilization Act of 1970, as amended, 12

[4] During the administrative proceedings and at the time of the filing of this suit, Placid was almost wholly dependent for its refinery feedstock on the buy/sell program. After that program was amended in 1977 to provide that the sellers (by definition, the largest oil companies in the country) could raise their prices to the average cost of imported oil, Placid found that it could purchase imported oil on the spot market for prices well below what it was being charged for the buy/sell crude. Accordingly, it withdrew from the buy/sell program in February, 1978. The recent shortage of oil, however, has made it impossible for Placid to purchase adequate amounts of oil for its refinery at any price and, accordingly, Placid has been required to return to the buy/sell program. Were Placid able to use its own oil in its own refinery, it would not need to be in that program at all.

U.S.C. § 1904 note, on August 3, 1977, appealing from the FEA's denial of exception relief. Placid contended (1) that the denial of the Application was arbitrary and discriminatory and marked an unwarranted and unexplained deviation from the administrative precedent established in *Delta Refining Co.*, 2 FEA ¶ 83,275 (September 11, 1975) ("Delta") (A-58), and *Louisiana Land and Exploration Co.*, 2 FEA ¶ 83,339 (October 22, 1975), *modified*, 3 FEA ¶ 80,586 (February 26, 1976) ("LL&E") (A-32 and A-48); (2) alternatively, that the December 1 Rule was unconstitutional; and (3) alternatively, that the December 1 Rule was violative of statutory authority.

Placid moved for Summary Judgment on its first claim and the FEA moved for Summary Judgment on all of Placid's claims.

Without granting a hearing on these motions, the District Court on February 26, 1979, entered its Memorandum Opinion and Order granting all of the FEA's Motions for Summary Judgment and overruling Placid's and, on March 28, 1979, entered its Judgment to the same effect (A-105, A-130).

The District Court expressed reservations concerning several portions of its decision, but felt that the decision was compelled by the "narrow standard" of review which it believed had been defined in prior TECA decisions.

Placid appealed the District Court decision to TECA where, on July 13, 1979, the Court in a two sentence Opinion affirmed the decision of the District Court.

3. Composition of the Record

This suit being in the nature of an appeal from the FEA's Order, the record in the court below was the administrative record.

The administrative record reveals that there were no hearings held, that the evidence consisted solely of written submissions of both fact and law by Placid or its attorneys and by other oil companies, and that there were no submissions of evidence by the agency itself. The submissions by other companies are alluded to by the agency in but one sentence of one of its orders and then only with regard to the objection of those companies to Placid's requested relief from the payment of the handling charge required under the buy/sell program, an issue not involved here.

Thus, the only evidence in this record on Placid's operations and the effect of the regulations on those operations is that offered by Placid. There is no evidence controverting Placid's factual assertions.

4. The Placid and LL&E Evidence

There are no factual issues to be resolved, but a brief review and a contrasting of the evidence adduced by Placid before the agency and the evidence adduced by Louisiana Land and Exploration in prior administrative hearings is essential to an understanding of Placid's contentions and of the discriminatory nature of the agency actions.

Placid's proof before the agency showed the following. In the early 1960s, Placid initiated plans to move into the refining and marketing sector of the industry and, to that end, entered into projects involving construction of pipelines and other facilities for the handling of Louisiana sweet crude produced by the Company and the acquisition of land as a future plant site for downstream processing. From 1962 through 1974, Placid participated in the construction of an extensive transportation system which would enable it to enter the refinery business on the lower Mississippi River. This system had a total capital cost, not counting gathering and flow lines, in excess of $84,000,000. In 1964, at a cost of $1,000,000, Placid purchased a tract of land as a future site for its refinery. Rather than beginning construction of a refinery, however, Placid purchased, in December, 1974, a 36,000 bpd refinery which was under construction at Port Allen, Louisiana, a site less than 35 miles from the original proposed plant site. Since its construction, several million dollars have been spent to complete, improve and expand the refinery.

Placid's investment in the refinery was made in reliance upon the assumption that it would be able to utilize its own crude oil as the refinery's sole source of supply. As the agency itself conceded, "the Port Allen Refinery was specifically designed to process the crude oil which Placid produces" (A-86). Use of crudes other than the 36.6° API Sweet South Louisiana Crude reduces the refinery's operating efficiency and adversely affects its economic viability.

At the time of Placid's refinery purchase, the EPAA and the December 1 Rule were scheduled to expire in February, 1975. However, in December, 1974, Congress extended the enabling statute to August 31, 1975 and subsequently extended it to September 30, 1981.

When the December 1 Rule was extended, Placid was forced to make application for exception to that rule and, in the meantime, to seek alternate crude supplies. Despite its efforts to do so, Placid's refinery was unable to secure the supplies except through the Buy/Sell List. *See Placid Ref. Co.*, 3 FEA ¶ 80,526, n. 2 (December 10, 1975). However, the crude oil so acquired was of varying types and qualities requiring constant restructuring of the processing systems and was more expensive than the national average.

As a result of the difficulties caused by the interaction of the December 1 Rule and the buy/sell program, Placid's refining operation incurred losses of $2,350,000 in the nine-month period of operation from date of acquisition to date of original application for relief. The actual loss for the refinery's first year of operation was $4,000,000.[5]

Placid was denied any relief by the FEA.

On February 26, 1976, the final *LL&E* decision (A-48) was rendered by the FEA, granting LL&E exception relief from the December 1 Rule on facts which were, in all material respects, identical to those of Placid's. However, in the first *Placid* opinion, delivered nearly two months later on April 9, 1976, the agency did not discuss, or even refer to, the latest *LL&E* opinion. Rather, it cited the prior *LL&E* decision (A-32) which had denied relief from the December 1 Rule and was essentially reversed by the second opinion. Likewise, the agency did not cite or discuss the last *LL&E* decision in its second *Placid* opinion.

The definitive *LL&E* opinion is cited by the FEA for the first and only time in its summary dismissal of Placid's request for reconsideration, the last document in a 545-page administrative record.

The following facts are revealed by the LL&E opinions and the Placid record. (Certain material facts regarding LL&E are not reflected in the FEA decisions, but were adduced in Placid's evidence before the agency.) Prior to

[5] The $4,000,000 figure was unaudited and was the latest figure available to be introduced before the agency. Post-administrative hearing adjustments to Placid's accounting reduced the refinery's first year net loss to $1,565,000. Footnote 4 to the District Court's Opinion and Order is factually incorrect to the extent that it states that the refinery showed a "small profit" in its first year of operation. The balance of the footnote is correct.

the promulgation of the December 1 Rule, LL&E, like Placid, was an independent non-integrated producer seeking to enter the refinery business. In 1973, it initiated plans for the construction of a 30,000 barrel per day refinery, construction of which was begun in October, 1974 (after promulgation of the December 1 Rule) and completed in September, 1975. LL&E built its refinery anticipating that the feedstock would be the oil which LL&E produced from the Jay Field in northwestern Florida. Prior to the construction of the refinery, all of that oil production was being sold to Exxon and the December 1 Rule required that LL&E continue to do so. LL&E proceeded with construction, however, in reliance upon the announced expiration date of the Rule. When the Rule was extended, LL&E sought exception relief.

As a result of the December 1 Rule, LL&E's refinery suffered a loss, including interest payable and depreciation, in its first year of operations, although its consolidated picture was entirely healthy.

The first LL&E decision denied the company relief from the December 1 Rule, but granted it some access through the buy/sell program to the Jay crude being sold to Exxon.[6] The second LL&E decision essentially reversed the first and granted full relief from the December 1 Rule. The relief was granted because LL&E's investment in the refinery would be unproductive in the absence of such relief, because the construction of its new refinery furthered "important national energy objectives," because of the announced expiration date of the Rule, and because LL&E was

[6] Placid was never granted even the relief which LL&E first received, *i.e.*, it was not even afforded access to its own crude through the buy/sell program.

"an independent firm seeking to enter the refining sector of the petroluem industry."

REASONS FOR GRANTING THE WRIT

The uncontroverted facts presented by Placid to the FEA were, in all material respects, identical to the facts presented in LL&E, yet the results are opposite. The sanctioning by the courts below of this patent discrimination was based principally upon their belief that the agency's action on Placid's Application for Exception was required to be upheld if it had "any rational basis," a standard of review applied in various prior TECA decisions.

Placid contends that:

(a) the courts below erroneously construed past TECA decisions and applied a standard of review which might be appropriate to determine the validity of a regulation, but is wholly inappropriate to determine whether the regulation is applied evenhandedly;

(b) if the standard of review applied by the courts below was, in fact, that prescribed by TECA for this sort of determination, then it is a new standard, not applicable to any other federal agency, and contrary to decisions of this Court and other courts of appeal;

(c) if the "any rational basis" test is to be used in the context of this case, then it denies Placid, and others similarly situated, any effective appellate review of agency decisions; and

(d) the decisions of the courts below not to consider either the constitutionality or the continuing statutory validity of the December 1 Rule are contrary to decisions of this Court and other TECA decisions.

1. The "Any Rational Basis" Test is Inapplicable to the FEA's Decisions

Where two agency decisions are "factually similar and ostensibly inconsistent," (as the District Court held was the case here) the agency is required to explain "its reasons for reaching different results." *Local 814, Int'l. Bro. of Teamsters* v. *NLRB*, 512 F.2d 564, 567 (D.C. Cir. 1975). This Court has many times held that the agency decision must be reversed if the explanation offered by the agency for its departure from precedent is non-existent or inadequate. *NLRB v. Food Store Employees*, 417 U.S. 1 (1974); *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962); *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947).

This Court and the circuit courts have laid down a clear and logical series of guidelines for determining the adequacy of an agency's explanation for its departure from precedent. The agency's explanation must detail:

(a) clearly explained specific factual distinctions, *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654 (1954); *NLRB* v. *General Stencils, Inc.*, 472 F.2d 170, 174 (2d Cir. 1972);

(b) the substantial evidence which supports the distinctions, *NLRB* v. *Cleveland Trust Company*, 214 F.2d 95 (7th Cir. 1954);

(c) the relevance of the distinctions to the purposes of the underlying statutes and regulations, *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971); *Marco Sales Company* v. *FTC*, 453 F.2d 1, 8 (2d Cir. 1971);

(d) all without reference to the post-hoc rationalizations of the agency's counsel, *Burlington Truck Lines* v. *United States, supra.*

It is the foregoing standards, not the so-called "any rational basis" test, which constitute the proper standards for review of the FEA's determination of Placid's exception request in light of the prior LL&E opinion. Where the question for the court is whether the agency's actions are discriminatory, it is not enough for the agency simply to say it had a reason for the discrimination. Rather, as the court said in *Columbia Broadcasting System, Inc.* v. *FCC, supra*, the agency must demonstrate that it is acting "in a wholly rational, logical fashion, completely free from even the appearance of bias, prejudice, and improper influence." 454 F.2d at 1027.

Placid does not believe that past TECA opinions did, in fact, prescribe the "any rational basis" test for the determination of questions of discriminatory agency decisions, but only prescribed such a test for the purpose of determining the validity of regulations promulgated by the agency. With but one exception, the cases cited by the courts below in support of such test are ones in which the court was determining the *validity* of a regulation, not the individual *application* of a regulation. The one case which is not of that type, *Powerine Oil Co.* v. *FEA*, 536 F.2d 378 (TECA 1976), is less than clear on the point and certainly does not directly reject the impressive body of precedent cited above.

For whatever reasons, however, it is clear that the courts below did abandon the standards heretofore prescribed by this Court and other courts of appeal. The District Court found that *LL&E* was "similar in many respects to Placid" (A-118) and that there were "several significant unexplained inconsistencies between the agency's reasoning in the two cases" (A-123). However, in the opinion of the District Court, there were two grounds on which the *LL&E* case could be distinguished and some "rational basis" thereby provided for the agency decision. The first of these purported distinctions the District Court itself characterizes as being "not a wholly satisfying one," "slightly unfair" and "technical" (A-122). The second purported distinction the District Court characterized as "not a distinction of resounding significance."

Upon the granting of this Writ, Placid will demonstrate that the two distinctions which the District Court believed it had found are not supported by substantial evidence and, in fact, are contrary to the uncontroverted evidence. For present purposes, however, it is sufficient to note that on the face of the District Court's Opinion, it is clear that the court did not feel bound to consider only what the agency said in its decision nor did it require the agency to demonstrate the regulatory significance of any distinctions which existed. It is obvious that Judge Higginbotham had grave reservations about the essential justice of his decision, but felt that his decision was mandated by the extraordinarily narrow standard of review which he believed TECA had prescribed. Placid respectfully submits that the lower courts' error will, if allowed to stand, taint the entire adjudicatory process in the agency and permit unexplained and unjustified discrimination.

2. If the "Any Rational Basis" Test is Applicable to This Type Of Case, then the Decisions Below are in Conflict with Decisions of This Court and Other Courts of Appeal

If the courts below have property construed past TECA decisions and TECA has, in fact, held that the "any rational

basis" test is applicable to any action of any kind of the agency, then Placid submits that TECA is squarely in conflict with decisions of this Court and other courts of appeal.

As demonstrated above, TECA's "any rational basis" test, when applied in this type of case, is squarely in conflict with the D.C. Circuit's Opinion in *Columbia Broadcasting System, Inc.* v. *FCC, supra.* This case requires the agency to demonstrate that its discrimination between similarly situated parties is "wholly rational," while TECA requires only that the court find "any rational basis" for the decision.

As demonstrated above, if the "any rational basis" test is applicable to this case, it is squarely in conflict with this Court's decisions in *Burlington Truck Lines* v. *United States, supra,* and *FTC* v. *Texaco,* 417 U.S. 380 (1974). Those cases teach that:

> The courts may not accept appellate counsel's post-hoc rationalizations for agency action; Chenery [*Securities and Exchange Comm.* v. *Chenery Corp.,* 332 U.S. 194 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . .

371 U.S. at 216.

The "any rational basis" test, on the other hand, requires the court to seek any rationalization, either its own or that of the agency, for the agency's action and, in this case, the court did engage in such a post-hoc rationalization process.[7]

As demonstrated above, if the "any rational basis" test is applicable in this case, then the decisions below were squarely at odds with such cases as *NLRB v. General Stencils, Inc. supra,* and *Columbia Broadcasting System, Inc. v. FCC, supra,* which hold that the agency must demonstrate the significance of the perceived differences to the purposes of the act and regulations being administered. The courts below discuss no such requirement, require no such showing by the agency and, in fact, sustain the agency's action solely upon distinctions determined to be unsatisfying, unfair, technical and insignificant.

[7] See, for example, A-124 — A-125, where the District Court discusses what "conceivably" could justify one of the FEA's rulings and surmises what the agency "apparently" concluded.

In short, if the courts below have correctly construed the "any rational basis" test and have properly applied it in this case, then their decisions are diametrically opposed to decisions of this Court and of the vast weight of authority.

3. The Application of the "Any Rational Basis" Test for Review of Agency Orders Denies Placid Effective Judicial Review Consistent with the Congressionally Mandated "Substantial Evidence" Standard

Congress has mandated that the courts review the orders of the energy agencies by the substantial evidence standard, § 5(a) (1) of the EPAA, 15 U.S.C. § 754(a) (1), incorporating 12 U.S.C. § 1904 note § 211. Had it so chosen, Congress could have legislated a more circumscribed review. By mandating substantial evidence review, Congress made the express policy decision to afford private parties, such as Placid, meaningful recourse to the courts. However, review by TECA and the District Court below pursuant to the "any rational basis" test has established a virtually insurmountable bar to relief, has failed to comply with the standards normally associated with "substantial evidence" review and has denied the clear congressional intention to afford meaningful, effective review of agency orders. Observers more objective than Placid have argued that the "any rational basis" test established by TECA has inadequately controlled administrative decision making.

See, Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 119. The application by the courts below of the "any rational basis" test to the facts of this case supports that argument.

The *American Heritage Dictionary of the English Language* (1st ed. 1969), defines "rational" as follows:

1. Having or exercising the ability to reason.
2. Of sound mind; sane.
3. Manifesting or based on reason; logical.

The near impossibility of meeting the "any rational basis" test is immediately apparent. The "any rational basis" test essentially requires the aggrieved party demonstrate that the agency decision makers were insane.

The TECA's adoption, and the District Court's application, of the "any rational basis" test for review of agency orders, *Powerine v. FEA, supra*, distinguished from agency regulations, *Basin, Inc. v. FEA*, 552 F.2d 931 (TECA 1977), has permitted an inquiry which ignores the requirement of having *relevant evidence* support the order and directed the court's attention only to the agency's conclusion. The mere requirement that the reviewing court determine that the agency's action was based on reason or was logical does not limit the reviewing court, as does substantial evidence review, to basing the reasons and logic on evidence in the record. The failure to limit review to the evidence has, in essence, allowed a standardless review, permitted the courts to justify action on the basis of post-hoc rationalizations and encouraged the courts to engage in speculation unsupported by evidence found in the record.

Despite TECA's own admonition that the courts should not "rubber-stamp" agency actions, *Basin, Inc. v. FEA, supra*

at 934, the "any rational basis" test has created an insurmountable bar to overturning agency orders, since almost any ground suggested by the agency will normally manifest some degree of reason or logic, but may not necessarily be supported by substantial, relevant evidence.

Placid has demonstrated that the "any rational basis" test, as applied by TECA, is unique to that court and the agencies which it oversees, but is in conflict with the decisions of this Court and the circuit courts. It also clearly fails to meet the standards normally associated with the statutorily mandated substantial evidence review. Substantial evidence is "more than a mere scintilla" and means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Substantial evidence inquiry requires the reviewing court to examine the evidence and processes of decision-making. "Any rational basis" review requires only an examination of the agency's conclusions. When, as in this case, the administrative record is devoid of *relevant evidence* contradicting the contentions and evidence submitted by the aggrieved party, the reviewing court must conclude that the agency's decision fails to satisfy the congressionally mandated review.

The onerous impact of the standardless, "any rational basis" test becomes even more harsh when the courts, as did the district court below, also accord due deference to the agency's presumed expertise. This Court cautioned against blind reliance on agency expertise in *Baltimore & Ohio R. Co. v. Aberdeen R. Co.*, 303 U.S. 87 (1969). In affirming a district court decision finding an Interstate Commerce Commission decision unsupported by substantial evidence, this

Court, citing *Burlington Truck Lines v. United States*, 371 U.S. 156 at 167 (1962), commented:

> If we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says the average territorial costs represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is. *The requirement for administrative decisions based on substantial evidence and reasoned findings — which alone make effective judicial review possible — would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming " 'a monster with no practical limits on its discretion.' "*
>
> (emphasis supplied)

303 U.S. 91-92.

As Placid has previously argued to the TECA, the review of *regulations* may, in fact, necessitate deference to the administrative agency. However, in this case, the courts have reviewed an *order* of the agency with a question as to the evenhanded application of a regulation to an individual firm. The resolution of that question does not depend upon agency "expertise" but involves judicial processes wholly familiar to the courts. If the agency has adequately delineated the perceived distinctions in accordance with the proper standards, then the Court can determine whether such distinctions are, in fact, significant and material. If the agency has not delineated its rationale properly, then the Court is obligated to say so. What the Court is safeguarding and declaring, in such a case, is not policy, but the rule of law. Such a function does not call for deference to the agency, but rather the full focus of the judicial process. Particularly relevant here is the observation in *Columbia Broadcasting System, Inc. v. FCC*, *supra*, at 1025:

> Moreover, judicial vigilance to enforce the rule of law in the administrative process is particularly crucial where, as here, the area under consideration is in a constant state of flux.

The distinction here made is no different in kind from the distinction often made in constitutional cases between the validity of a statute or regulation on its face and its validity as applied. *See e.g., Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535 (1934); *Lovelace v. United States*, 357 F.2d 306 (5th Cir. 1966); *Globe Seaways, Inc. v. Panama Canal Co.*, 509 F.2d 969 (5th Cir. 1975).

In conclusion, Placid will demonstrate to the court, upon granting of a Writ, that the courts below have wholly failed to accord Placid with the congressionally mandated substantial evidence review. Rather, those courts have imposed upon Placid a burden impossible to meet, in conflict with the decisions of this Court and in frustration of the statutorily guaranteed right.

4. The Refusal of the Courts Below to Pass Upon the Constitutional Issue is in Conflict With Prior TECA Decisions

Placid contends that the December 1 Rule works a taking of private property without just compensation in violation of the Fifth Amendment to the United States Constitution. The Courts below have not dealt with the merits of that issue. The District Court, as it conceded (A-126), is without power to determine the constitutional validity of the Regulation under § 5(a) of the EPAA, 15 U.S.C. § 754(a). The District Court did, however, citing *Basin, Inc. v. FEA*, *supra*, decide that "while the constitutional claim is by no means a frivolous one," it was, nonetheless, not a substan-

tial one and would not be certified (A-128). Rather obviously, the District Court's granting of a summary judgment on the basis of that finding is procedurally improper.

More fundamentally, however, both that holding and TECA's apparent refusal to write on the issue at all, are in conflict with *Condor Operating* v. *Sawhill*, 514 F.2d 351 (TECA 1975).

In *Condor*, in response to a constitutional attack on the December 1 Rule, TECA said:

> A reasoned decision for the *temporary* suspension of usual ownership prerogative based upon broad national needs does not constitute necessarily an unconstitutional taking; and *the issue of whether it does properly turns upon the circumstances of each case.*

514 F.2d at 361. TECA then upheld the constitutionality of the Rule *at that time*, but specifically withheld decision on whether the Rule would be valid "as a *long continuing response* to chronic energy problems." 514 F.2d at 362. TECA, in *Condor*, left open two questions. First, at what point does the regulatory program cease to be merely "temporary" and become "a long continuing response?" Second, at the point when it becomes "a long continuing response," is it constitutional? *Basin* answered neither of these questions. *Basin* addressed the constitutionality of the December 1 Rule in one paragraph. 552 F.2d at 938. TECA there held, in an opinion which predated the passage of the Department of Energy Organization Act, 42 U.S.C. § 7101 (1978), that, *as applied to Basin*, there was no taking and TECA cited only one case — *Condor*.

Basin was not a producer of oil; Placid is. Basin was not being stripped of the prerogative of ownership over oil it already owned; Placid is. Whether the Rule is constitutional

as applied to Basin does not answer the question of whether it is constitutional as applied to Placid.

Further, the December 1 Rule has now clearly become "a long continuing response to chronic energy problems." Over five years have passed since the original promulgation of the Rule, four years since *Condor*, and two years since *Basin*. After the Basin decision, the Department of Energy Organization Act was passed, transferring the FEA's powers to a new department of government, thereby recognizing the relatively permanent nature of the regulatory program and of the general energy problem which that program is designed to combat.

The constitutional question which Placid raises is a substantial one and will continue to be so until the courts treat the December 1 Rule as "a long continuing response" and determine its constitutionality on that basis.

5. The Refusal of the Courts Below to Consider the Statutory Validity of the December 1 Rule is in Conflict with Decisions of this Court

The District Court, again citing *Condor* and *Basin*, granted the FEA's Motion for Summary Judgment on the issue of whether the December 1 Rule was, given the changing circumstances since its promulgation, in excess of statutory authority. The court did not hold that there were no factual issues presented regarding changing conditions or, in fact, that there were no material fact questions of any kind. Rather, after stating Placid's argument, the court merely stated:

> It is a matter of judgment whether Placid should be able to try this claim. In view of the extremely narrow standard of review, Placid's chances of success on the claim are negligible. (A-129)

These findings, obviously, are not what is required of the court under Rule 56, FED. R. CIV. P. The court is required to find that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Again more fundamentally, however, the District Court's holding is contrary to decisions of this Court. As the District Court noted, Placid contended that, in light of changing circumstances, the reasons for the December 1 Rule no longer existed and that the Rule was no longer, if it ever had been, consistent with the objectives of the EPAA. This Court has held, in response to arguments similar to those of Placid, that Placid should be entitled to make such a showing.

Even in the case of statutes, the courts are free to re-examine the factual underpinnings of the litigation. Mr. Justice Brandeis said many years ago:

> A statute valid when enacted may become invalid by change in the conditions to which it is applied.

Nashville, C. & St. L. R. Co. v. Walters, 294 U.S. 405, 415 (1935). A challenge based on change of conditions, of necessity, raises questions of fact. In *Leary v. United States*, 395 U.S. 6, 38 (1969), the Supreme Court said:

> A statute based upon a legislative declaration of facts is subject to constitutional attack upon the ground that the facts no longer exist; *in ruling on such a challenge a court must, of course, be free to re-examine the factual declaration.*

Such a challenge is made "by a showing to the court that those facts have ceased to exist." *Milnot Company v. Richardson*, 350 F.Supp. 221 (S.D. Ill. 1972). Placid was not permitted to make this showing.

Questions of fact abound concerning the impact of changing conditions and altered related regulatory programs on the continuing rationality of the December 1 Rule. These questions of fact should not have been resolved "as a matter of judgment" by the District Court in Summary Judgment proceedings.

CONCLUSION

Placid is probably destroyed as an effective competitor in the refining business if the decisions of the courts below are allowed to stand. The problems raised in Placid's case, however, are not unique to Placid and have a far greater impact than the survival of this single company. The questions which Placid raises and this Court's disposition of them will have an enormous impact on the integrity of the entire administrative process as it is practiced in the Department of Energy.

If the agency is free to discriminate without reference to any regulatory purpose for that discrimination, to truly material distinctions or to substantial evidence for its conclusion and reaches a conclusion solely on the premise that a rational basis for distinction exists, then an agency precedent is worthless and agency discretion is unfettered.

If a court created by Congress specifically to review an agency's activities refuses to follow other judicial precedent and creates for itself standards of review so stringent as to render agency determinations virtually unassailable, then the the right of review is illusory and the intent of Congress is frustrated.

If constitutional rights can be infringed in the name of an emergency, but the existence of an emergency, once

determined, can never be reexamined, then no constitutional rights are safe.

If rules may continue to exist when the facts upon which they were based no longer do, then what was truth may become error and that error will become destiny.

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with the United States Supreme Court Rules 33 (1) and 33 (2) (a), true copies of the foregoing Petition for Writ of Certiorari were mailed first-class air mail, postage prepaid, on this 13th day of August, 1979, to the following counsel for Appellees:

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A. B. Conant, Jr.

APPENDIX

10 C.F.R. § 211.64 (Now § 211.63) (1974) (December 1 Rule)

§ 211.64 Supplier/Purchaser Relationships.

(a) All contracts for sales, purchasers, and exchanges of domestic crude oil in effect on December 1, 1973, shall remain in effect for the duration of this program except purchases and sales made to comply with this program; provided, however, that (1) any contract or agreement for the sale, purchase, or exchange of domestic crude oil may be terminated by the mutual consent of both parties; (2) the provisions of this paragraph do not apply to an exempt sale of crude oil pursuant to § 210.32 of this chapter; and (3) the provisions of this paragraph shall not apply to the seller of any crude oil if the present purchaser of such crude oil refuses, after notice by the seller, to meet any bona-fide offer made by another purchaser to buy such crude oil at a lawful price above the price paid by the present purchaser.

(b) New domestic crude petroleum may be sold to any person. Once the sale is made the seller of such new crude petroleum shall continue to sell to that purchaser subject to the provisions of paragraph (a) (1), (2), and (3) of this section, provided that the purchaser agrees to meet any bona-fide price which the seller could obtain by selling the crude oil to another purchaser.

10 C.F.R. § 211.65 (Buy/Sell Program (1974))

§ 211.65 Method of Allocation.

(a) Refiner-sellers must offer for sale crude oil, directly or through exchange, to refiner-buyers. The crude oil offered must be suitable for processing in and practical for delivery to the refiner-buyer.

(b) The terms and conditions of each sale of crude oil, other than the prices which shall be determined pursuant to Part 212 of this Chapter shall be consistent with normal business practices.

(c) Exchanges of crude oil may be utilized to comply with the purchase and sell provisions of this program, provided they are on a barrel-for-barrel basis. Normal quality exchange differentials are allowed.

(d) Refiner-buyers who are unable to negotiate a contract to purchase crude oil within the time period allotted pursuant to § 211.66(g) may request that the FEO compel a refiner-seller to sell an acceptable type of crude oil to the refiner-buyer. Upon such request, the FEO may direct a refiner who has not sold its required volume to sell crude oil to the refiner-buyer. Should the refiner-buyer decline to purchase the crude oil specified by the FEO, any of that refiner's rights to purchase that volume of crude oil based on the allocation program are forfeited during that crude oil sales period, provided that all other terms of the allocation program have been met by the seller.

(e) Refiner-sellers who have not negotiated sales with refiner-buyers of the required volume of crude oil within fifteen (15) days of the publication of the refiner-seller and refiner-buyer lists specified in paragraph (i) of this section shall so notify the FEO, which may then direct such sales.

(f) Each refiner shall estimate the total supplies of crude oil (including crude oil produced from a stripper well lease defined in § 210.32 of this chapter) to become available for his processing during a given quarter. This estimate, the supply of domestic crude oil and imported crude oil available during the corresponding quarter of 1973, as described in § 211.66, and the refiner capacity, shall be reported to FEO. Based on these estimates, and the refiner capacities as reported, a national refiner supply/capacity ratio shall be calculated and published by the FEO. In calculating a national refiner supply/capacity ratio, and the supply/capacity ratio for each refiner, the maximum allocable supply attributed to any refiner by the FEO shall be the lesser of estimated supply available for the forthcoming quarter or the amount of crude oil available during the corresponding period of 1973 considering the provisions of § 211.13.

(g) Each refiner who has crude oil processed by another refiner shall report that volume of crude oil in his estimate of the available supply of crude oil. Refiners who process crude oil for others shall report that volume of crude oil to the FEO. However, the FEO shall not include such supply in the estimate of available crude oil for purposes of determining the processing refiner's supply-capacity ratio.

(h) Each refiner whose estimate of allocable crude supplies to become available during the quarter would result in a supply/capacity ratio exceeding the FEO's published ratio is required to offer for sale and to sell crude oil to refiner-buyers in amounts sufficient to reduce its supply/capacity ratio to the national supply/capacity ratio.

(i) A refiner-buyer and refiner-seller listing shall be published by the FEO. A refiner-buyer so listed may purchase from listed refiner-sellers a quantity of crude oil during the

quarter which will result in a supply/capacity ratio for that refiner-buyer equal to the national supply/capacity ratio.

(j) The volumes on the refiner-buyer and refiner-seller lists shall be modified in a subsequent quarter, by adding or subtracting, as appropriate, the difference between the estimated crude oil runs during the preceding quarter and the actual volume of crude oil run by refiners during the preceeding quarter.

(k) All crude oil transferred pursuant to this subpart shall be priced in accordance with § 212.88 of this chapter.

10 C.F.R. § 211.65 (Buy/Sell Program (1976))

§ 211.65 Method of allocation.

(a) *Eligibility for allocation.* (1) Any small refiner may apply to FEA for an allocation for one or more of its refineries; *provided, that* the small refiner (i) purchased crude oil under the provisions of this section during the period September 1, 1976 through August 31, 1977, (ii) was listed on the buy/sell notices during the period September 1, 1976 through August 31, 1977, with an allocation of zero (0) barrels in all four allocation quarters in that period, or (iii) as to small refiners not shown on such buy/sell notices and other small refiners with newly constructed refining capacity or reactivated refineries or refining capacity, had completed the process design basis for the refining capacity concerned and had expended or were irrevocably committed to expend prior to August 24, 1977, an amount equal to at least twenty (20%) percent of the total cost of such refining capacity, in which latter case the FEA may assign such refining capacity a maximum allocation of twenty-five (25%) percent of the capacity. Such allocation will be in effect for a period not to exceed two allocation periods, following

which the allocation for such refining capacity shall be calculated in accordance with the provisions of paragraph (b) of this section.

(2) A refinery shall only be eligible for an allocation if it is not deemed to have access to imported crude oil (other than Canadian crude oil).

(3) A refinery shall be deemed to have access to imported crude oil if:

(i) twenty (20%) percent of its crude oil runs to stills (excluding crude oil purchased pursuant to this section) during the period January 1, 1977 through June 30, 1977 were comprised of imported (other than Canadian) crude oil; or

(ii) it is located at a port or on a navigable inland waterway providing access to imported crude oil, unless the small refiner that owns the refinery can document that it could not receive imported crude oil for one of the following reasons:

(A) the refinery is only accessible by water for a portion of the year; or

(B) the refinery was constructed to process domestic crude oil, and lacks dock and/or storage facilities that would permit it to process imported crude oil; or

(iii) it has direct access to a pipeline that routinely carries imported crude oil (other than Canadan crude oil) to inland refineries, unless the small refiner that owns the refinery can document that it could not receive a sufficient quantity of imported crude oil by pipeline for one of the following reasons:

(A) the refinery's volume of crude oil runs to stills (excluding crude oil processed for other refiners) have de-

creased by fifteen (15%) percent or more in the six months immediately preceding the refiner's application due to documented pipeline proration,

(B) the required minimum size of pipeline shipments exceeds the refinery's storage capacity, or other available storage in the immediate area, or

(C) the refiner is required to supply pipeline fill in order to use the pipeline, and the minimum pipeline fill requirements are more than one half of the refinery's storage capacity.

(4) Small refiners eligible under subparagraph (1) of this paragraph to apply for allocations for one or more of their refineries shall submit applications by September 1, 1977 for a determination of the refineries' eligibility for an allocation for the allocation period commencing October 1, 1977. For subsequent allocation periods, applications must be submitted no less than 60 days or more than 90 days prior to the beginning of the allocation period. Applications shall be addressed to the Program Manager, Crude Oil Allocation, FEA, in accordance with the procedures established in Subpart G of Part 205 of this chapter. Each application shall contain the information (including documentation where appropriate) necessary for the FEA to evaluate the application under the criteria specified in subparagraph (3) of this paragraph and the data on crude oil runs to stills necessary to calculate an allocation under paragraph (b) of this section, including the information specified in § 211.66 (d) for the months of June and July 1977. Documentation should include copies of correspondence with pipeline companies, as well as any published requirements of pipeline companies as to required minimum shipments. Separate applications must be submitted for each refinery. The FEA may

request additional information if necessary for evaluation of the application and shall notify each applicant of its determination as to eligibility of the refinery or refineries concerned by September 30, 1977 for the allocation period commencing October 1, 1977 and, for subsequent allocation periods, 15 days prior to the beginning of the period.

(5) Notwithstanding the provisions of subparagraph (1) of this paragraph (a), any small refiner that did not purchase crude oil under the provisions of this section during the period September 1, 1976 through August 31, 1977 may apply to FEA at any time for an allocation for one or more of its refineries; *provided, that* such refiner shall be required to demonstrate that it has incurred in the preceding six-month period or will incur in the six-month period following the application a reduction, due to circumstances over which such refiner had no control, in its supply of domestic crude oil for the refinery for which an allocation is sought equal to at least twenty-five (25%) percent of such crude oil supply. In the event FEA determines that such refinery is eligible for an allocation under subparagraph (2) and (3) of this paragraph (a), the FEA may assign the refinery a maximum allocation equal to the amount of the reduction in its domestic crude oil supplies. In granting a request of such a refiner for an allocation, the FEA may direct one or more refiner-sellers to sell a suitable type of crude oil to such refiner pursuant to paragraph (j) of this section.

(b) *Purchase opportunities of refiner-buyers.* (1) In each allocation period, each refiner-buyer shall be entitled to purchase, for each refinery owned by that refiner-buyer that is determined by the FEA not to have access to imported crude oil an amount of crude oil equal to the difference between the volume of crude oil runs to stills (not includ-

ing crude oil processed for other refiners) at the eligible refinery in the corresponding period of the previous year (October 1, 1976 through March 31, 1977 for the first allocation period) and the volume of the crude oil runs to stills (not including crude oil processed for other refiners) at the eligible refinery for the six-month period immediately preceding the allocation period for which the allocation is being determined (calculated by utilizing the level of the crude oil runs to stills at that refinery in the first four months of the period for the entire six-month period) less the volume of the crude oil runs to stills in the latter six-month period attributable to crude oil purchased under this section; *provided, that* any allocation granted under this paragraph may be adjusted if FEA determines pursuant to paragraph (a) of this section that a refiner-buyer's refinery has access to imported crude oil during certain seasons of the year.

(2) Crude oil allocated under this section shall be processed only at the refinery as to which the allocation was granted, and such crude oil must be processed in that refinery within forty-five days following the close of the allocation period for which that crude oil was allocated.

(3) No allocation shall be made under this section which will result in crude oil supplies in excess of one hundred (100%) percent of refining capacity for any refiner-buyer's refinery.

(4) No refiner-buyer shall purchase under this section crude oil imported from Canada for processing in any first priority refinery (as defined in Part 214 of this chapter) owned by that refiner-buyer.

(c) *Review of eligibility for allocations, adjustments to purchase opportunities, and emergency supplemental allocations.* (1) Upon application by a small refiner to the FEA

no less than 60 days or more than 90 days prior to the beginning of an allocation period, the FEA may: (i) review the eligibility of a refinery owned by that refiner where significant changes in the refinery's access to imported crude oil have occurred since the refinery was determined by FEA to be ineligible for an allocation; (ii) adjust the allocation as to an eligible refinery to compensate for reductions in crude oil runs to stills due to unusual or nonrecurring operating conditions; or (iii) adjust the allocation as to an eligible refinery to compensate for an unconsummated directed sale under paragraph (j) of this section due to documented delays in delivering crude oil to be sold under this section by the refiner-seller during the period September 1, 1976 through August 31, 1977, or an allocation period subsequent to October 1, 1977. Requests for review of eligibility for an allocation or adjustment to an allocation shall be made in accordance with the procedures established in Subpart G of Part 205 of this chapter. The FEA shall make its determination within forty-five (45) days of the receipt of the application.

(2) Upon application at any time by a refiner-buyer, the FEA may grant an emergency supplemental allocation for one or more of the refiner-buyer's eligible refineries for one or more allocation periods, or for part of an allocation period; *provided, that* such refiner shall be required to demonstrate that it has incurred or will incur a reduction in its crude oil supply (excluding crude oil allocated under this section or under § 211.63) for the eligible refinery for which an emergency supplemental allocation is sought equal to at least twenty-five (25%) percent of such crude oil supply in the preceding six-month period. In granting a request of a refiner-buyer for an emergency supplemental allocation, the FEA may also direct one or more refiner-sellers to sell a suitable type of crude oil to such refiner-buyer pursuant

to paragraph (j) of this section. Requests for an emergency supplemental allocation shall be made in accordance with the procedures established in Subpart G of Part 205 of this chapter. The FEA shall make its determination within ten (10) days of the receipt of the application.

(3) The FEA may at any time, without application by the refiner-buyer concerned, review the eligibility of or allocation as to a refinery. Specifically, the FEA may institute such a review where it believes that significant changes in the supplies of domestic crude oil for any refinery have occurred or because of the need to reconsider the refinery's access to imported crude oil pursuant to paragraph (a) (3) of this section. The FEA may request additional information from the refiner concerned for the purposes of such a review. If appropriate, the FEA may determine that a refinery is ineligible for further allocations or may adjust the allocation of a refinery pursuant to an order issued under Subpart G of Part 205 of this chapter.

(d) *Leased or purchased refineries.* Leased or purchased refineries shall continue to be eligible for allocations on the same basis as in effect for the lessor or the previous owner, as the case may be; *provided, that* the lessee or new refiner as to the refinery is a small refiner.

(e) *Computation of total allocation obligation.* The sum of the quantities of crude oil that all refiner-buyers are eligible to purchase for delivery during an allocation period shall be the total allocation obligation for refiner-sellers for such allocation period.

(f) *Refiner-sellers' sales obligations.* (1) *Sales obligation of each refiner-seller.* (i) Effective for the allocation period commencing October 1, 1977 and subsequent allocation periods, the FEA shall compute a sales obligation for each refiner-seller as provided in paragraph (f) (2) and (3) of

this section. The total of the sales obligations of all refiner-sellers shall be equal to the total allocation obligation for the particular allocation period as computed in paragraph (e) of this section.

(ii) Each refiner-seller shall offer for sale, directly or through exchange, to refiner-buyers during an allocation period a quantity of crude oil equal to that refiner-seller's sales obligation.

(2) *Calculation of sales obligations.* (i) The sales obligation for each refiner-seller shall consist of that refiner-seller's fixed percentage share as calculated under subparagraph (2) (ii) of this paragraph (f) multiplied by the total sales obligation for all refiner-sellers adjusted by any carryovers of unsold sales obligations and FEA approved reductions in sales obligations for sales in excess of sales obligations in previous allocation periods.

(ii) A refiner-seller's fixed percentage share is its proportionate share of the total refining capacity of all refiner-sellers as reported to the Bureau of Mines on January 1, 1973, as certified by the FEA. Changes in refining capacity shall not subject a refiner-seller to any change in its fixed percentage share over the share identified for the first allocation period. No refiner-seller shall be required to sell any of its supplies of crude oil under this section if the sale thereof would effect a reduction in the supplies of crude oil imported from Canada allocated under Part 214 of this chapter to any first priority refinery (as defined in Part 214) owned by that refiner-seller or if the sale thereof would effect a reduction in the supply levels of domestic crude oil for any such first priority refinery, except that such refiner-seller is required to offer for sale under this section the average volumes of domestic crude oil sold under this section in the period September 1, 1976, through August 31,

1977, for use at an eligible first priority refinery owned by a refiner-buyer.

(3) *Carryover of sales obligations.* (i) The volume of each refiner-seller's unsold sales obligation in an allocation period shall be added to that refiner-seller's sales obligation in one or more subsequent allocation periods; *provided that* the unsold sales obligations of each refiner-seller so carried over shall not exceed an amount equal to the product of such refiner-seller's sales obligations and the largest percentage of a sales obligation sold by any refiner-seller, less the volume of crude oil sold by such refiner-seller.

(ii) The FEA shall pursuant to paragraph (j) (3) of this section, or may at its discretion in other cases, reduce a refiner-seller's sales obligation in an allocation period for sales in excess of its published sales obligation in a previous allocation period.

(g) (1) *Buy/sell notice.* The buy/sell notice for the allocation period commencing October 1, 1977, shall be issued on or about September 15, 1977. For subsequent allocation periods, the buy/sell notice shall be published at least thirty days prior to the beginning of the allocation period. Each buy/sell notice shall list the quantity of crude oil each refiner-buyer is eligible to purchase, the total allocation obligation for all refiner-sellers, the fixed percentage share for each refiner-seller and the quantity of crude oil that each refiner-seller will be obligated to offer for sale to refiner-buyers. Upon publication of the notice, refiner-buyers and refiner-sellers shall negotiate purchases and sales of crude oil allocated pursuant to the notice. All sales, except directed sales pursuant to paragraph (j) of this section, must be contracted for within thirty (30) days after the publication of the buy/sell notice, and all deliveries must be completed

within thirity (30) days following the close of the allocation period.

(2) Following the issuance of a buy/sell notice pursuant to subparagraph (1) of this paragraph (g), the FEA may: (i) grant an allocation to a refiner-buyer pursuant to subparagraph (5) of paragraph (a) of this section; (ii) grant an emergency supplemental allocation pursuant to paragraph (c) of this section; (iii) adjust any allocation shown on such buy/sell notice; or (iv) issue one or more directed sales orders that would result in one or more refiner-sellers selling more than their published sales obligations for that allocation period pursuant to subparagraph (3) of paragraph (j) of this section, without issuing a supplemental buy/sell notice listing such allocations, adjustments to allocations or increased sales obligations.

(h) *Sale/purchase transaction report.* Within forty-eight hours of the completion of arrangements therefor, each transaction made to comply with this section shall be reported in writing or by telex by the buyer and seller to the FEA. This report shall identify the refiner-seller, the refiner-buyer, the refineries to which the crude oil is to be delivered, the volumes of crude oil sold or purchased, and the period over which the delivery is expected to take place.

(i) *Conditions of sale.* (1) The terms and conditions of each sale of crude oil other than the prices, shall be consistent with normal business practices.

(2) The crude oil offered must be suitable for processing in the refiner-buyer's refinery. Crude oil is deemed to be suitable for processing in a refinery if it has historically been processed in the refinery or if it has the same characteristics as crude oil that has historically been processed in the refinery. A refiner-seller may not be required to sup-

ply a specific type of crude oil to a refiner-buyer's refinery if the volume of the crude oil that would be sold would account for a greater percentage of the refinery's total crude oil runs to stills in the allocation period concerned than was the case for that type of crude oil during the previous twenty-four month period.

(3) The crude oil offered for sale by a refiner-seller must be practical for delivery to and physically capable of being delivered to the refiner-buyer's refinery. The refiner-seller is responsible for arranging delivery of allocated crude oil to the refiner-buyer's refinery; *provided that* in the event that a refiner-seller offers for sale or is directed to sell pursuant to paragraph (j) of this section crude oil to a refiner-buyer for processing in any first priority refinery (as defined in Part 214 of this chapter) owned by that refiner-buyer in excess of the average volume of domestic crude oil purchased by that refiner-buyer for that refinery in the period September 1, 1976 through August 31, 1977, and if such excess volume of crude oil is not practical for delivery to such refiner-buyer's refinery, such refiner-seller shall deliver such excess volume of crude oil to a location within the United States to which the refiner-seller can arrange delivery and at which the refiner-buyer can arrange for the exchange of the crude oil for Canadian crude oil; and *further provided that* in the event of an exchange the refiner-seller may require the refiner-buyer to demonstrate that it has obtained approval of the exchange from the Director, Oil Imports, pursuant to Part 213 of this chapter and has been issued an export license by the Department of Commerce for the volume of crude oil involved.

(4) All crude oil sold pursuant to this section shall be priced in accordance with the provisions of Part 212 of this chapter.

(5) Exchanges of crude oil may be utilized to comply with the purchase and sale provisions of this section.

(j) *Failure to negotiate transactions.* (1) Each refiner-buyer shall make its best effort to consummate the purchase of crude oil under this subpart from refiner-sellers prior to requesting assistance from the FEA. A refiner-buyer that is able to demonstrate its inability to consummate a sale despite making such effort may request, in accordance with the procedures established under Subpart G of Part 205 of this chapter, that the FEA direct one or more refiner-sellers to sell a suitable type of crude oil to such refiner-buyer. Such a request must be received by the FEA no later than 20 days after the publication of the buy/sell notice for the allocation period for which the assignment of a refiner-seller is requested. Such a request must also document the refiner-buyer's inability to purchase crude oil from refiner-sellers by supplying the following information to the FEA:

(i) Name of the refiner-buyer and of the person authorized to act for the refiner-buyer in transactions under this section.

(ii) Names and locations of the refineries for which crude oil has been sought, the amount of crude oil sought for each refinery, and the technical specifications of crude oil that have historically been processed in each refinery.

(iii) Statement of any restrictions, limitations or constraints on the refiner-buyer's purchases of crude oil, particularly concerning the manner or time of deliveries.

(iv) Names and locations of all refiner-sellers from which crude oil has been sought under the buy-sell notice, the refineries for which crude oil has been sought, and the volume and specifications of the crude oil sought from each refiner-seller.

(v) The response of each refiner-seller to which a request to purchase crude oil has been made, and the name and telephone number of the individual contacted at each such refiner-seller.

(vi) Such other pertinent information as the FEA may request.

(2) Upon receipt of such a request, the FEA may direct one or more refiner-sellers that have not sold their required sales obligations for the allocation period to sell crude oil to the refiner-buyer. If the refiner-buyer declines to purchase the crude oil specified by the FEA, the rights of that refiner-buyer to purchase that volume of crude oil are forfeited during that allocation period, provided that the refiner-seller or refiner-sellers have fully complied with the provisions of this section.

(3) The FEA may direct refiner-sellers to sell crude oil to refiner-buyers that have been unable to purchase their total allocations for the allocation period. In directing refiner-sellers to make such sales, the FEA shall consider the percentage of each refiner-seller's sales obligations for the allocation period that has been sold, as reported pursuant to paragraph (h) of this section, as well as the refiner-seller or sellers that can best be expected to consummate particular directed sales. If, in the FEA's opinion, a valid directed sale request cannot reasonably be expected to be consummated by a refiner-seller that has not completed all or substantially all of its sales obligation for the allocation period, the FEA may issue one or more directed sales orders that would result in one or more refiner-sellers selling more than their published sales obligations for that allocation period. In such cases, the refiner-seller or sellers will receive a barrel-for-barrel reduction in their sales obligations for the next allocation period pursuant to paragraph (f) (3) (ii) of this section.

10 C.F.R. § 211.65 (1978)

§ 211.65 Method of allocation.

(a) *Eligibility for allocation.* (1) Any small refiner may apply to FEA for an allocation for one or more of its refineries: *Provided*, That the small refiner (i) purchased crude oil under the provisions of this section during the period September 1, 1976 through August 31, 1977, (ii) was listed on the buy/sell notice during the period September 1, 1976 through August 31, 1977, with an allocation of zero (0) barrels in all four allocation quarters in that period, or (iii) as to small refineries not shown on such buy/sell notices and other small refiners with newly constructed refining capacity or reactivated refineries or refining capacity, had completed the process design basis for the refining capacity concerned and had expended or were irrevocably committed to expend prior to August 24, 1977, an amount equal to at least twenty (20%) percent of the total cost of such refining capacity, in which latter case the FEA may assign such refining capacity a maximum allocation of twenty-five (25%) percent of the capacity. Such allocation will be in effect for a period not to exceed two allocation periods, following which the allocation for such refining capacity shall be calculated in accordance with the provisions of paragraph (b) of this section.

(2) A refinery shall only be eligible for an allocation if it is not deemed to have access to imported crude oil (other than Canadian crude oil).

(3) A refinery shall be deemed to have access to imported crude oil if:

(i) Twenty (20%) percent of its crude oil runs to stills (excluding crude oil purchased pursuant to this section) during the period January 1, 1977 through June 30, 1977

were comprised of imported (other than Canadian) crude oil; or

(ii) It is located at a port or on a navigable inland waterway providing access to imported crude oil, unless the small refiner that owns the refinery can document that it could not receive imported crude oil for one of the following reasons:

(A) The refinery is only accessible by water for a portion of the year, or

(B) The refinery was constructed to process domestic crude oil, and lacks dock and/or storage facilities that would permit it to process imported crude oil; or

(iii) It has direct access to a pipeline that routinely carries imported crude oil (other than Canadian crude oil) to inland refineries, unless the small refiner that owns the refinery can document that it could not receive a sufficient quantity of imported crude oil by pipeline for one of the following reasons:

(A) The refinery's volume of crude oil runs to stills (excluding crude oil processed for other refiners) have decreased by fifteen (15%) percent or more in the six months immediately preceding the refiner's application due to documented pipeline proration,

(B) The required minimum size of pipeline shipments exceeds the refinery's storage capacity, or other available storage in the immediate area, or

(C) The refiner is required to supply pipeline fill in order to use the pipeline, and the minimum pipeline fill requirements are more than one-half of the refinery's storage capacity.

(4) Small refiners eligible under paragraph (a)(1) of this section to apply for allocations for one or more of their refineries shall submit applications by September 1, 1977 for a determination of the refineries' eligibility for an allocation for the allocation period commencing October 1, 1977. For subsequent allocation periods, applications must be submitted no less than 60 days or more than 90 days prior to the beginning of the allocation period. Applications shall be addressed to the Program Manager, Crude Oil Allocation, FEA, in accordance with the procedures established in Subpart G of Part 205 of this chapter. Each application shall contain the information (including documentation where appropriate) necessary for the FEA to evaluate the application under the criteria specified in paragraph (a)(3) of this section and the data on crude oil runs to stills necessary to calculate an allocation under paragraph (b) of this section, including the information specified in § 211.66(d) for the months of June and July 1977. Documentation should include copies of correspondence with pipeline companies, as well as any published requirements of pipeline companies as to required minimum shipments. Separate applications must be submitted for each refinery. The FEA may request additional information if necessary for evaluation of the application and shall notify each applicant of its determination as to eligibility of the refinery or refineries concerned by September 30, 1977, for the allocation period commencing October 1, 1977, and, for subsequent allocation periods, 15 days prior to the beginning of the period.

(5) Notwithstanding the provisions of subparagraph (1) of this paragraph (a), any small refiner that did not purchase crude oil under the provision of this section during the period September 1, 1976, through August 31, 1977 may apply to FEA at any time for an allocation for one or more

of its refineries; *Provided*, That such refiner shall be required to demonstrate that it has incurred in the preceding six-month period or will incur in the six-month period following the application a reduction, due to circumstances over which such refiner had no control, in its supply of domestic crude oil for the refinery for which an allocation is sought equal to at least twenty-five (25) percent of such crude oil supply. In the event FEA determines that such refinery is eligible for an allocation under subparagraphs (2) and (3) of this paragraph (a), the FEA may assign the refinery a maximum allocation equal to the amount of the reduction in its domestic crude oil supplies. In granting a request of such a refiner for an allocation, the FEA may direct one or more refiner-sellers to sell a suitable type of crude oil to such refiner pursuant to paragraph (j) of this section.

(b) *Purchase opportunities of refiner-buyers.* (1) In each allocation period, each refiner-buyer shall be entitled to purchase, for each refinery owned by that refiner-buyer that is determined by the FEA not to have access to imported crude oil, an amount of crude oil equal to the difference between the volume of crude oil runs to stills (not including crude oil processed for other refiners) at the eligible refinery in the corresponding period of the previous year (October 1, 1976 through March 31, 1977 for the first allocation period) and the volume of the crude oil runs to stills (not including crude oil processed for other refiners) at the eligible refinery for the six month period immediately preceding the allocation period for which the allocation is being determined (calculated by utilizing the level of the crude oil runs to stills at that refinery in the first four months of the period for the entire six-month period) less the volume of the crude oil runs to stills in

the latter six month period attributable to crude oil purchased under this section: *Provided*, That any allocation granted under this paragraph may be adjusted if FEA determines pursuant to paragraph (a) of this section that a refiner-buyer's refinery has access to imported crude oil during certain seasons of the year.

(2) Crude oil allocated under this section shall be processed only at the refinery as to which the allocation was granted, and such crude oil must be processed in that refinery within forty-five days following the close of the allocation period for which that crude oil was allocated.

(3) No allocation shall be made under this section which will result in crude oil supplies in excess of one hundred (100%) percent of refining capacity for any refiner-buyer's refinery.

(4) No refiner-buyer shall purchase under this section (i) crude oil imported from Canada for processing in any first priority refinery (as defined in Part 214 of this chapter) owned by that refiner-buyer or (ii) domestic crude oil for processing in any such first priority refinery in excess of the average volumes thereof purchased by that refiner-buyer for that refinery in the period September 1, 1976 to August 31, 1977.

(c) *Review of eligibility for allocations, adjustments to purchase opportunities, and emergency supplemental allocations.* (1) Upon application by a small refiner to the FEA no less than 60 days or more than 90 days prior to the beginning of an allocation period, the FEA may: (i) Review the eligibility of a refinery owned by that refiner where significant changes in the refinery's access to imported crude oil have occurred since the refinery was determined by FEA to be ineligible for an allocation; (ii)

adjust the allocation as to an eligible refinery to compensate for reductions in crude oil runs to stills due to unusual or nonrecurring operating conditions; or (iii) adjust the allocation as to an eligible refinery to compensate for an unconsummated directed sale under paragraph (j) of this section due to documented delays in delivering crude oil to be sold under this section by the refiner-seller during the period September 1, 1976 through August 31, 1977, or an allocation period subsequent to October 1, 1977. Requests for review of eligibility for an allocation or adjustment to an allocation shall be made in accordance with the procedures established in Subpart G of Part 205 of this chapter. The FEA shall make its determinations within forty-five (45) days of the receipt of the application.

(2) Upon application at any time by a refiner-buyer, the FEA may grant an emergency supplemental allocation for one or more of the refiner-buyer's eligible refineries for one or more allocation periods, or for part of an allocation period; *Provided,* That such refiner shall be required to demonstrate that it has incurred or will incur a reduction in its crude oil supply (excluding crude oil allocated under this section or under § 211.63) for the eligible refinery for which an emergency supplemental allocation is sought equal to at least twenty-five (25%) percent of such crude oil supply in the preceding six-month period. In granting a request of a refiner-buyer for an emergency supplemental allocation, the FEA may also direct one or more refiner-sellers to sell a suitable type of crude oil to such refiner-buyer pursuant to paragraph (j) of this section. Requests for an emergency supplemental allocation shall be made in accordance with the procedures established in Subpart G of Part 205 of this chapter. The FEA shall make its determination within ten (10) days of the receipt of the application.

(3) The FEA may at any time, without application by the refiner-buyer concerned, review the eligibility of or allocation as to refinery. Specifically, the FEA may institute such a review where it believes that significant changes in the supplies of domestic crude oil for any refinery have occurred or because of the need to reconsider the refinery's access to imported crude oil pursuant to paragraph (a) (3) of this section. The FEA may request additional information from the refiner concerned for the purposes of such a review. If appropriate, the FEA may determine that a refinery is ineligible for further allocations or may adjust the allocation of a refinery pursuant to an order issued under Subpart G of Part 205 of this chapter.

(d) *Leased or purchased refineries.* Leased or purchased refineries shall continue to be eligible for allocations on the same basis as in effect for the lessor or the previous owner, as the case may be; *Provided,* That the lessee or new refiner as to the refinery is a small refiner.

(e) *Computation of total allocation obligation.* The sum of the quantities of crude oil that all refiner-buyers are eligible to purchase for delivery during an allocation period shall be the total allocation obligation for refiner-sellers for such allocation period.

(f) *Refiner-sellers' sales obligations* — (1) *Sales obligation of each refiner-seller.* (i) Effective for the allocation period commencing October 1, 1977 and subsequent allocation periods, the FEA shall compute a sales obligation for each refiner-seller as provided in paragraph (f) (2) and (3) of this section. The total of the sales obligations of all refiner-sellers shall be equal to the total allocation obligation for the particular allocation period as computed in paragraph (e) of this section.

(ii) Each refiner-seller shall offer for sale, directly or through exchange, to refiner-buyers during an allocation period a quantity of crude oil equal to that refiner-seller's sales obligation.

(2) *Calculation of sales obligations.* (i) The sales obligation for each refiner-seller shall consist of that refiner-seller's fixed percentage share as calculated under subparagraph (2) (ii) of this paragraph (f) multiplied by the total sales obligation for all refiner-sellers adjusted by any carryovers of unsold sales obligations and the FEA approved reductions in sales obligations for sales in excess of sales obligations in previous allocation periods.

(ii) A refiner-seller's fixed percentage share is its proportionate share of the total refining capacity of all refiner-sellers as reported to the Bureau of Mines on January 1, 1973, as certified by the FEA. Changes in refining capacity shall not subject a refiner-seller to any change in its fixed percentage share over the share identified for the first allocation period. No refiner-seller shall be required to sell any of its supplies of crude oil under this section if the sale thereof would effect a reduction in the supplies of crude oil imported from Canada allocated under Part 214 of this chapter to any first priority refinery (as defined in Part 214) owned by that refiner-seller or if the sale thereof would effect a reduction in the supply levels of domestic crude oil for any such first priority refinery, except that such refiner-seller is required to offer for sale under this section the average volumes of domestic crude oil sold under this section in the period September 1, 1976, through August 31, 1977, for use at an eligible first priority refinery owned by a refiner-buyer.

(3) *Carryover of sales obligations.* (1) The volume of each refiner-seller's unsold sales obligation in an allocation

period shall be added to that refiner-seller's sales obligation in one or more subsequent allocation periods: *Provided,* That the unsold sales obligations of each refiner-seller so carried over shall not exceed an amount equal to the product of such refiner-seller's sales obligations and the largest percentage of a sales obligation sold by any refiner-seller, less the volume of crude oil sold by such refiner-seller.

(ii) The FEA shall pursuant to paragraph (j) (3) of this section, or may at its discretion in other cases, reduce a refiner-seller's sales obligation in an allocation period for sales in excess of its published sales obligation in a previous allocation period.

(g) *Buy/sell notice.* (1) The buy/sell notice for the allocation period commencing October 1, 1977, shall be issued on or about September 15, 1977. For subsequent allocation periods, the buy/sell notice shall be published at least thirty days prior to the beginning of the allocation period. Each buy/sell notice shall list the quantity of crude oil each refiner-buyer is eligible to purchase, the total allocation obligation for all refiner-sellers, the fixed percentage share for each refiner-seller and the quantity of crude oil that each refiner-seller will be obligated to offer for sale to refiner-buyers. Upon publication of the notice, refiner-buyers and refiner-sellers shall negotiate purchases and sales of crude oil allocated pursuant to the notice. All sales, except directed sales pursuant to paragraph (j) of this section, must be contracted for within thirty (30) days after the publication of the buy/sell notice, and all deliveries must be completed within thirty (30) days following the close of the allocation period.

(2) Following the issuance of a buy/sell notice pursuant to subparagraph (1) of this paragraph (g), the FEA may:

(i) grant an allocation to a refiner-buyer pursuant to subparagraph (5) of paragraph (a) of this section; (ii) grant an emergency supplemental allocation pursuant to paragraph (c) of this section; (iii) adjust any allocation shown on such buy/sell notice; or (iv) issue one or more directed sales orders that would result in one or more refiner-sellers selling more than their published sales obligations for that allocation period pursuant to subparagraph (3) of paragraph (j) of this section, without issuing a supplemental buy/sell notice listing such allocations, adjustments to allocations or increased sales obligations.

(h) *Sales/purchase transaction report.* Within forty-eight hours of the completion of arrangements therefor, each transaction made to comply with this section shall be reported in writing or by telex by the buyer and seller to the FEA. This report shall identify the refiner-seller, the refiner-buyer, the refineries to which the crude oil is to be delivered, the volumes of crude oil sold or purchased, and the period over which the delivery is expected to take place.

(i) *Conditions of sale.* (1) The terms and conditions of each sale of crude oil, other than the prices, shall be consistent with normal business practices.

(2) The crude oil offered must be suitable for processing in the refiner-buyer's refinery. Crude oil is deemed to be suitable for processing in a refinery if it has historically been processed in the refinery or if it has the same characteristics as crude oil that has historically been processed in the refinery. A refiner-seller may not be required to supply a specific type of crude oil to a refiner-buyer's refinery if the volume of the crude oil that would be sold would account for a greater percentage of the refinery's total crude oil runs to stills in the allocation period concerned

than was the case for that type of crude oil during the previous twenty-four month period.

(3) The crude oil offered for sale by a refiner-seller must be practical for delivery to and physically capable of being delivered to the refiner-buyer's refinery. The refiner-seller is responsible for arranging delivery of allocated crude oil to the refiner-buyer's refinery.

(4) All crude oil sold pursuant to this section shall be priced in accordance with the provisions of Part 212 of this chapter.

(5) Exchanges of crude oil may be utilized to comply with the purchase and sale provisions of this section.

(j) *Failure to negotiate transactions.* (1) Each refiner-buyer shall make its best effort to consummate the purchases of crude oil under this subpart from refiner-sellers prior to requesting assistance from the FEA. A refiner-buyer that is able to demonstrate its inability to consummate a sale despite making such effort may request, in accordance with the procedures established under Subpart G of Part 205 of this chapter, that the FEA direct one or more refiner-sellers to sell a suitable type of crude oil to such refiner-buyer. Such a request must be received by the FEA no later than 20 days after the publication of the buy-sell notice for the allocation period for which the assignment of a refiner-seller is requested. Such a request must also document the refiner-buyer's inability to purchase crude oil from refiner-sellers by supplying the following information to the FEA:

(i) Name of the refiner-buyer and of the person authorized to act for the refiner-buyer in transactions under this section.

(ii) Names and locations of the refineries for which crude oil has been sought, the amount of crude oil sought for each refinery, and the technical specifications of crude oil that have historically been processed in each refinery.

(iii) Statement of any restrictions, limitations or constraints on the refiner-buyer's purchases of crude oil, particularly concerning the manner or time of deliveries.

(iv) Names and locations of all refiner-sellers from which crude oil has been sought under the buy-sell notice, the refineries for which crude oil has been sought, and the volume and specifications of the crude oil sought from such refiner-seller.

(v) The response of each refiner-seller to which a request to purchase crude oil has been made, and the name and telephone number of the individual contacted at each such refiner-seller.

(vi) Such other pertinent information as the FEA may request.

(2) Upon receipt of such a request, the FEA may direct one or more refiner-sellers that have not sold their required sales obligations for the allocation period to sell crude oil to the refiner-buyer. If the refiner-buyer declines to purchase the crude oil specified by the FEA, the rights of that refiner-buyer to purchase that volume of crude oil are forfeited during that allocation period *provided*, that the refiner-seller or refiner-sellers have fully complied with the provisions of this section.

(3) The FEA may direct refiner-sellers to sell crude oil to refiner-buyers that have been unable to purchase their total allocation for the allocation period. In directing refiner-sellers to make such sales, the FEA shall consider the percentage of each refiner-seller's sales obligations for the allocation period that has been sold, as reported pursuant to paragraph (h) of this section, as well as the refiner-seller or sellers that can best be expected to consummate particular directed sales. If, in the FEA's opinion, a valid directed sale request cannot reasonably be expected to be consummated by a refiner-seller that has not completed all or substantially all of its sales obligation for the allocation period, the FEA may issue one or more directed sales orders that would result in one or more refiner-sellers selling more than their published sales obligations for that allocation period. In such cases, the refiner-seller or sellers will receive a barrel-for-barrel reduction in their sales obligation for the next allocation period pursuant to paragraph (f) (3) (ii) of this section.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185).

[42 FR 42775, Aug. 24, 1977, as amended at 42 FR 54259, Oct. 5, 1977]

15 U.S.C. § 754(a)(1) (1973)

§ 754. Administration and enforcement; delegation of authority; civil and criminal penalties

(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

12 U.S.C. § 1904

§ 211 Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding, an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the cases shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

2 FEA ¶ 83,339 (Nov. 21, 1975)

Louisiana Land and Exploration Company, New Orleans, Louisiana (Case No. FEE-1776, Filed 6-27-75, Decided 10-22-75).

[*The original of this document contains information which is arguably confidential under 18 U. S. C. 1905. Such material has been deleted and is replaced by x's.*]

On June 27, 1975, the Louisiana Land and Exploration Company (LL&E) filed an Application for Exception from the provisions of 10 CFR 211.63(a) with the Office of Exceptions and Appeals of the Federal Energy Administration. The exception request, if granted, would permit LL&E to retain and utilize in its newly-constructed refinery 30,000 barrels per day of crude oil which the firm is presently required to sell to Exxon Company, U.S.A. (Exxon) pursuant to the requirements set forth in Section 211.63(a) (the December 1 Rule).

LL&E is a Maryland corporation with its principal business operations located in New Orleans, Louisiana. The firm is a natural resource company engaged primarily in oil and gas exploration and in the development of its oil, gas and industrial real estate properties. LL&E's major oil and gas producing property interests are in southern Louisiana, the Gulf of Mexico off the Louisiana coast and in northwestern Florida. The firm has not previously engaged in petroleum refining or marketing operations.

In early 1973 LL&E initiated plans for the construction of a 30,000 barrel per day refinery located in Mobile, Alabama. By January 1974 the firm had incurred actual cash expenditures of approximately xxxxx and contractual commitments in excess of xxxxx for acquisition of refinery components. Construction of the Mobile facility was completed in September 1975 at a total cost of xxxxxx and the refinery is scheduled to commence operations in late October 1975. Financing of the refinery has been entirely internally generated with no public or outside private financing involved.

The refinery utilizes a fractionating procedure which will process the crude oil into the following petroleum products:

TABLE A

Product	*Percentage Yield*
LPG	6.9%
Light Naphtha	36.6
Heavy Naphtha	9.2
No. 1 Fuel Oil	18.8
No. 2 Fuel Oil	12.5
Residual Fuel Oil	16.0
Total	100.0%

In constructing the new refinery, LL&E anticipated that its crude oil feedstocks would consist exclusively of the 30,000 barrels per day of crude oil which the firm owns and produces from the Jay-Little Escambia Creek Field in northwestern Florida (Jay crude). On December 1, 1973, however, LL&E was selling its Jay crude production to Exxon under a contract which expired by its own terms on September 1, 1974. As a result, LL&E is obligated under the provisions of Section 211.63(a) to continue to sell the crude oil involved to Exxon.[1]

[1] The provisions of 10 CFR 211.63(a) generally require that all supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on December 1, 1973 shall remain in effect for the duration of the Mandatory Petroleum Allocation Program.

Concurrent with the submission of its Application for Exception, LL&E filed with the FEA Office of Regulatory Programs an application for certification of future refining capacity under the provisions of 10 CFR 211.65(b). That Section establishes a procedure whereby small and independent refineries such as LL&E with refining facilities which will become operational after May 1, 1974 may request an allocation of crude oil under the FEA's Crude Oil Buy/Sell Program. On September 26, 1975 the FEA Assistant Administrator for Regulatory Programs issued a Decision and Order which granted an allocation of 358,270 barrels of crude oil prorated to 240,483 barrels for the allocation quarter commencing September 1, 1975. LL&E contends that this allocation represents approximately 22 percent of the quantity which it requested and constitutes less than one half of the minimum amount of crude oil feedstocks necessary to mechanically operate the firm's refinery.

In its present Application for Exception, LL&E contends that the application of Section 211.63(a) to it results in a gross inequity. The firm states that the refinery project was planned and commenced prior to the promulgation of the Mandatory Petroleum Allocation Program, and that LL&E was committed to an investment of over xxxxx by the time applicable FEA Regulations took effect on January 15, 1974. Moreover, LL&E contends that its decision to continue the project even after the imposition of the December 1 Rule was reasonable in view of the fact that the FEA's Allocation Program was scheduled to expire on August 31, 1975, prior to the time the refinery was due to become operational.

LL&E additionally argues that the refinery has been specifically designed to process the Jay crude oil. When the project was initially conceived, LL&E anticipated that the firm's own share of Jay Field crude production would be

the sole source of crude oil for the refinery. As a result, the capacity of the refinery was selected to equal LL&E's net Jay Field producing interest of 30,000 barrels per day and the facility has been designed to process this particular type of crude oil. The firm states, for example, that the major justification for LL&E's investment in the refinery was the fact that Jay crude yields approximately 50 percent naphtha, an amount substantially higher than that recoverable from other domestic and foreign crude oil. In addition, the refinery is presently capable of receiving crude oil solely from a pipeline that transports crude from the Jay Field to a distribution point adjacent to the Mobile facility. At the present time over 92 percent of Jay crude is controlled by five major oil companies, and all production from the Jay Field is subject to the provisions of Section 211.63 (a) or 211.65.

LL&E states that certain other domestic crude oils exist in the refinery's geographical area which are somewhat similar in quality to Jay crude and which could conceivably be used as a refinery feedstock. However, the firm asserts that a substantial redesign of the refinery and the construction of additional facilities would be required to process that crude oil efficiently and economically, and that those revisions would entail substantial additional costs which would jeopardize the economic viability of the project. Moreover, those alternate crude oil sources which are presently produced in marketable quantities are already committed to other purchasers under the provisions of the December 1 Rule.

LL&E maintains that it has attempted to secure additional sources of crude oil that are not suitable for processing in its refinery in the hope that such product could be exchanged for Jay crude. However, the firm has been unable

to obtain any crude oil which would permit the refinery to commence operations.

LL&E argues that its efforts to commence operations as a new and viable independent refiner are being frustrated by its inability to secure a reliable and continuous supply of crude oil suitable for processing in its refinery. The firm contends that in the absence of exception relief it will be unable to recoup its xxxxx investment and gain entry into the refining sector of the petroleum industry. LL&E maintains that this result is contrary to the national policy objectives of encouraging expanded domestic refining capacity and fostering competition within the small and independent sector of the petroleum industry. Finally, LL&E contends that if the requested exception were granted, the impact upon Exxon would be negligible in view of that firm's position as the nation's largest oil company with worldwide operations and sources of crude oil.

The FEA has reviewed LL&E's Application for Exception and supporting data and has determined that exception relief is warranted in the present case. Among the principle objectives of the Emergency Petroleum Allocation Act of 1973 (the EPAA) are the

> preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers; [and]
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> * * *
>
> equitable distribution of crude oil, residual fuel oil and refined petroleum products at equitable prices among all

> regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, and among all users .... EPAA Sections 4(b) (1) (D) and (F).

In promulgating the EPAA the Congress also indicated that the expansion of the nation's refining capacity was of primary importance:

> The conferees view the construction of new refineries, and the expansion of present refinery capacity, as critically important factors in maximizing the amount of petroleum products available to meet domestic demand. The conferees are concerned that refiners may be hesitant to make the substantial investments, and other commitments required for the construction of new refineries and the expansion of existing facilities unless they are assured of adequate supplies of crude oil for their facilities. Conference Rep. No. 93-628, 93rd Congress, 1st Session, 3 (1973).

The FEA reiterated these objectives when it issued its Regulations implementing the EPAA. In connection with certain amendments to the Mandatory Crude Oil Allocation Program, 10 CFR, Part 211, Subpart C, the FEA stated:

> FEO is committed to fostering construction of new and expanded refinery capacity. To this end, the revised crude allocation program is designed to assure adequate sources of crude oil for future refinery capacity which is not substantially constructed by May 1, 1974. The revised program establishes a procedure for allocations of crude oil supplies to this type of refinery capacity.
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> * * *
>
> FEO will continue to review the regulations applicable to new and expanded refinery capacity in light of world crude oil availability and access to world crude oil sup-

> plies by persons engaged in constructing new and expanded refinery capacity and is prepared to consider future changes in the rules whenever necessary to assure adequate crude oil supplies for this capacity. *FEO is also prepared to review the December 1, 1973 supplier/purchaser relationships established in § 211.63 in connection with this objective.* 39 Fed. Reg. 15960 (May 6, 1974). (Emphasis added.)

In addition, the expansion of domestic refining capacity as an important national energy policy objective has been enunciated in a number of previous FEA decisions. See *e.g., Quintana-Howell Joint Venture,* 2 FEA ¶ 80,556 (March 17, 1975); *Gulf Energy and Development Corp.,* 2 FEA ¶ 80,516 (January 29, 1975); *Pasco, Inc.,* 2 FEA ¶ 83,021 (January 20, 1975); *Navajo Refining Co.,* 2 FEA ¶ 83,003 (January 2, 1975); and *Apco Oil Co.,* 1 FEA ¶ 20,750 (December 23, 1974).

The FEA has in the past granted exception relief to small refiners with new or expanded refinery capacity who demonstrated that the provisions of Section 211.63(a) when applied to them resulted in a gross inequity. *Famariss Oil and Refining Co./Navajo Refining Co.,* 1 FEA ¶ 20,629 (July 22, 1974); and *Saber Refining Co.,* 1 FEA ¶ 20,736 (December 13, 1974). In view of the similar issues presented by the current Application, it is useful to review in some detail the consideration which led to the conclusion that exception relief was warranted in these prior cases.

In the *Famariss/Navajo* case, Famariss requested an exception from the provisions of Section 211.63(a) to permit it to purchase approximately 10,000 barrels per day of royalty crude oil from the State of New Mexico which on

December 1, 1973 were being sold to the Continental Oil Corporation under an interim contract. In 1971 Famariss had contracted with the State of New Mexico to receive the royalty oil on the condition that Famariss build a new refinery within the State. In reliance upon the agreement and in contemplation of utilizing this crude oil Famariss expended over $16 million to build the new refinery. In a 1972 contract arranged and approved by New Mexico, Famariss had agreed to share the same 10,000 barrels per day of royalty crude with Navajo Refining Company (Navajo) on the condition that Navajo expand the capacity of its Artesia, New Mexico, refinery. Navajo subsequently expanded the capacity of its refinery by 66.8 percent at an expense of more than $4 million in reliance on obtaining the New Mexico crude oil. Navajo similarly requested an exception from the provisions of the December 1 Rule to permit it to receive its share of the royalty oil as specified in the agreement with Famariss. In concluding that exception relief was appropriate, the FEA determined that: (i) both Famariss and Navajo had constructed new and expanded refinery facilities in reliance upon the agreement with the State of New Mexico which would enable them to purchase and refine certain crude oil; (ii) this investment occurred before the promulgation of the FEA regulatory program; (iii) the deprivation of the State royalty oil at issue would have jeopardized the continued operation of the new refineries in a manner which was contrary to the national objective of encouraging the development of expanded domestic refining capacity; and (iv) in view of the capital investment which these firms had made, deprivation of the

royalty oil would have resulted in a serious financial hardship and a gross inequity.

Similar considerations were present in the *Saber* Decision. In that case the Saber Refining Company (Saber) had purchased an unutilized Corpus Christi, Texas refinery in January 1973 with the intention of renovating and expanding the facility. The firm was unable to secure crude oil supplies from normal commercial sources to process at the refinery. However, on October 2, 1973 Saber was notified by the United States Geological Survey (U. S. G. S.) that it had been awarded the right to purchase 1,909 barrels per day of U. S. Government royalty crude oil. In reliance on this assurance of dependable supply of crude oil, Saber undertook a substantial investment which was equal to 50 percent of its total assets in the renovation and expansion of its refinery and designed that refinery to utilize the particular type of crude oil which it had been awarded. Saber had not completed arrangements for the purchase of the crude oil it had been awarded as of December 1, 1973, and under the provisions of Section 211.63 (a) the U. S. G. S. was obligated to supply the royalty oil to the December 1 purchasers. Consequently, Saber was prohibited from utilizing the crude oil upon which it had relied in determining to invest in its refinery expansion. Saber continued to invest in the refinery after the promulgation of the December 1 Rule because it relied upon assurances from the U. S. G. S. that the FEA regulatory program would be implemented in a manner consistent with the requirements and goals of the U. S. G. S. royalty oil program and that Saber would thus

be able to obtain the crude oil which it had previously been awarded.

In concluding that exception relief should be granted to Saber, the FEA determined that:

> The showing which Saber has made with respect to its exception application is similar in a number of important respects with the basis upon which exception relief was granted in the *Famariss* case. As in the Famariss situation, Saber had invested a considerable amount of capital in order to renovate and expand its refinery operation. That investment was in fact equal to 50 percent of the total capital assets of the firm and four times its net income in 1973. Moreover, the sizeable capital investment made by the firm was not only made in reliance on a reasonable expectation that the firm would receive a continuous and reliable supply of crude oil which would be made available to it by the U. S. G. S., but Saber's refinery was also expressly designed to refine the particular type of crude oil which it expected to receive from the U. S. G. S. *Saber Refining Company, supra.*

The FEA further determined that Saber would experience severe financial and operating difficulties unless it received the crude oil from the U. S. G. S., and concluded that the application of the provisions of Section 211.63 (a) to the firm resulted in a gross inequity.

LL&E has made a similarly strong showing that exception relief is appropriate in the present case. As indicated above, the firm planned and commenced the construction of its new refinery prior to the imposition of the FEA Mandatory Petroleum Allocation Program. By January 15, 1974, the date on which the FEA regulatory Program became effective, LL&E had incurred expenses of over xxxxx towards

the completion of the project. As in *Famariss/Navajo* and *Saber*, this investment was made in reliance upon the assumption that LL&E would be able to utilize its own crude oil as the refinery's sole source of supply. See also, *Ferguson Energy Corp.*, 2 FEA ¶ 83,175 (June 13, 1975), in which a crude oil reseller was granted an exception from the provisions of Section 211.63(a) to allow the firm to receive crude oil it had contracted to purchase prior to the promulgation of FEA Regulations, and in reliance upon which it had committed substantial expenditures to construct a new pipeline to receive the crude oil at issue. Moreover, LL&E has demonstrated that its decision to continue the construction of its refinery after the effective date of the FEA regulatory program was reasonable in view of the substantial amount of capital already committed to the project, the announced expiration date of the Allocation Program, and the established federal policy of encouraging the construction of new and expanded domestic refining capacity.

Moreover, the information submitted by LL&E in support of its exception request indicates that the firm's refinery was specifically designed to refine LL&E's own Jay crude production, and that the utilization of other types of crude oil will reduce operating efficiencies and adversely affect the project's economic viability. As indicated in Table A above, for example, naphtha is designed to be the firm's primary refined petroleum product. LL&E has indicated that the high yield of naphtha from Jay crude was a crucial factor in the firm's decision to enter the refining business and that based on its analysis of current market conditions the firm should have no difficulty in marketing naphtha in its geographical area. The utilization of other types of crude oil would substantially alter LL&E's proposed refinery mix and

reduce available naphtha supplies, and could well hamper the firm's ability to market its refined petroleum products in a profitable manner.

LL&E has also made a substantial showing that despite diligent efforts it has been unable to secure alternate crude oil supplies that could conceivably be utilized in the refinery or exchanged for Jay crude. The firm has submitted detailed surveys which document its unsuccessful efforts to obtain crude oil from numerous sources in LL&E's geographical area.

In addition, it should be noted that even if alternate crude oil supplies were presently available for processing at LL&E's Mobile refinery, substantial additional expenditures would be required to enable the facility to receive and refine such crude. The firm has estimated that on site process revisions and additional tankage installations of at least $4.2 million would be required to complete the necessary refinery conversion. The installation of such facilities would delay the commencement of refinery operations by approximately one year. Moreover, the expense involved in these revisions would adversely affect the economics of the project and would be rendered unproductive in the event that LL&E is able to utilize its own Jay crude at some time in the future.

Finally, LL&E has demonstrated that in the absence of exception relief it will lack the sufficient and reliable source of crude oil necessary to commence refining operations. Consequently, the firm's xxxxx investment would be rendered totally unproductive in the foreseeable future. As indicated above, this result is contrary to the express objectives specified in the EPAA and prior FEA decisions. Under

these circumstances, a gross inequity exists which warrants exception relief.

It should also be emphasized that the considerations presented by the present Application are clearly distinguishable from two prior FEA decisions in which exception relief from the provisions of Section 211.63(a) was denied. *See Gulf Energy and Development Corp., supra,* and *Quintana-Howell Joint Venture, supra.* Unlike the factual situation presented in *Gulf Energy,* (i) LL&E's refinery is almost operational; (ii) LL&E has already obtained all of the financing necessary to build its refinery and the necessary construction is completed; (iii) approval of LL&E's exception application will not deprive other small or independent refiners of the crude oil which they are currently receiving; and (iv) LL&E has demonstrated that in the absence of exception relief the firm will be unable to meet its crude oil requirements through other sources. Unlike the Quintana-Howell situation, the LL&E project involves construction of new refining capacity based upon a reasonable expectation of receiving a supply of crude oil which the refinery was specifically designed to process. Quintana-Howell, on the other hand, proposed to expand its existing refining operations and sought the assurance of an access to crude oil prior to commencing the expansion. The FEA determined in that case that Quintana-Howell had failed to demonstrate that it did not have the financial capacity to continue its expansion project in the absence of exception relief, that its refinery expansion project would not be economically feasible in the absence of relief, or that it would not be able to obtain access to crude oil for its expanded refinery if its Application for Exception were denied.

While the FEA has determined that exception relief is appropriate in the present case, the FEA has further con-

cluded that the specific form of relief proposed by LL&E in its Application for Exception is not warranted. In comments filed in connection with LL&E's Application, Exxon has stated that it resells a substantial portion of the crude oil derived from the Jay Field to third parties pursuant to its obligations under applicable FEA Regulations. The loss of the crude oil requested by LL&E (which amounts to some 10,950,000 barrels per year) would necessarily impose certain burdens upon Exxon. By comparison, under the provisions of 10 CFR 211.65(b) increased allocations under the Crude Oil Buy/Sell Program attributable to the construction of new refining capacity by small and independent refiners are distributed on a proportionate basis among all refiner-sellers.[2] In so doing, the FEA has attempted to strike a balance between the need to encourage refining expansion by small and independent refiners and the concomitant need to provide adequate crude oil supplies for such expansion by equitably distributing the resulting burden upon all refiner-sellers. The FEA has determined that similar considerations apply in the present case and that LL&E should be permitted to purchase an amount of Jay crude oil under the provisions of 10 CFR 211.65 sufficient to enable the firm to operate its refinery at the established national supply to capacity refining ratio. Such relief will allow LL&E to receive the Jay crude oil necessary for its refining operations while at the same time eliminating the

[2] Under the provisions of Section 211.65 the total crude oil sales obligations of refiner-sellers (major integrated oil companies) on the Refiners' Buy/Sell List are equal to the total volume of crude oil which refiner-buyers (small and independent refiners) are entitled to purchase in each allocation quarter. Concurrently, the sales obligation of each refiner-seller is distributed on the basis of its respective refinery capacity as of January 1, 1973. For a complete description of the Crude Oil Buy/Sell Program, see *Union Oil Co. of California,* 1 FEA ¶ 20,628 (July 19, 1974); and *Texaco, Inc. (Giant Industries, Inc.),* 1 FEA ¶ 20,184 (November 15, 1974).

supply dislocations which would inevitably result if exception relief from the provisions of the December 1 Rule was granted. LL&E has provided no information which would indicate that the form of relief set forth above is insufficient to alleviate the gross inequity found to exist or will have any material adverse effect upon the economic viability of the firm's refinery project.

It Is Therefore Ordered That:

(1) The Application for Exception from the provisions of 10 CFR 211.63 (a) submitted by the Louisiana Land and Exploration Company be and hereby is denied in the form submitted.

(2) The Louisiana Land and Exploration Company be and hereby is granted an exception from the provisions of 10 CFR 211.65 as set forth below.

(3) Notwithstanding any contrary provisions of 10 CFR, Part 211, or the Order issued to the Louisiana Land and Exploration Company on September 26, 1975, LL&E shall be permitted to purchase the following volumes of crude oil produced from the Jay-Little Escambia Creek Field in the State of Florida under the provisions of Section 211.65:

Allocation Quarter	*Barrels*
September 1, 1975- November 30, 1975	1,047,000
December 1, 1975- February 29, 1975	2,388,469
March 1, 1976- May 31, 1976	2,388,469

The provisions of Special Rule No. 5 to 10, CFR, Part 211, Subpart C shall apply to crude oil allocations made pursuant to the provisions of this paragraph.

(4) The exception relief set forth above shall only be applicable for the period September 1, 1975 through May 31, 1976.

(5) The FEA Assistant Administrator for Regulatory Programs or his designee shall take all appropriate action to effectuate the relief specified above.

(6) On or after May 1, 1976, LL&E may request that the relief granted to the firm for the period September 1975 through May 1976 be extended for an additional period of time. Any such request for exception shall adhere to the procedural requirements specified in 10 CFR, Chapter II, Part 205 and shall include the following information:

(i) comprehensive financial statements, including detailed profit and loss statements, and balance sheets, setting forth the financial position of LL&E's refining and petroleum product marketing operations through April 10, 1976;

(ii) a pro forma profit and loss statement and balance sheet for the calendar year ending December 31, 1976 setting forth the financial position of the firm's refining and petroleum product marketing operations;

(iii) a schedule indicating on a monthly basis the volumes of each petroleum product refined at LL&E's Mobile, Alabama refinery which are sold during the period October 22, 1975 through April 30, 1976, as well as the identity of each purchaser of such products;

(iv) LL&E's weighted average cost of crude oil utilized in the firm's refinery, stated on a monthly basis.

(7) This Decision is based upon the presumed validity of statements, allegations and documentary material submitted by the applicant. It may be revoked or modified at any time upon a determination that the factual basis underlying the Application for Exception is incorrect. In considering

standards governing the extent to which the relief granted by this Order shall be extended, the FEA shall consider the accuracy and validity of the materials accompanying the firm's original Application for Exception. Furthermore, the FEA may, by Order, direct appropriate adjustments or remedial action by LL&E to the extent that the firm's operating results are demonstrated to have been materially inaccurate.

(8) In accordance with the provisions of 10 CFR, Part 205, an aggrieved party may file an appeal from this Decision and Order with the Federal Energy Administration. The provisions of 10 CFR, Part 205, Subpart H set forth the procedures which govern the filing and determination of any such appeal.

3 FEA ¶ 80,586 (March 26, 1976)

Louisiana Land and Exploration Company, New Orleans, Louisiana (Case No. FEA-0695, Filed 12-19-75, Decided 2-26-76).

[*The original of this document contains information which is arguably confidential under 18 U. S. C. 1905. Such material has been deleted and is replaced by x's.*]

On December 19, 1975, the Louisiana Land and Exploration Company (LL&E) filed an Appeal from a Decision and Order which the Federal Energy Administration issued to it on October 22, 1975. *Louisiana Land and Exploration Co.*, 2 FEA ¶ 83,339 (October 22, 1975). The October 22 Order denied LL&E's request for an exception which would permit the firm to retain for use in its newly-constructed refinery the crude oil which it produces in the Jay-Little Escambia Creek Field in northwestern Florida (Jay crude). Under the provisions of 10 CFR 21.63(a) [sic] (the December 1 Rule), LL&E is required to sell the crude oil involved to the Exxon Company, U.S.A. (Exxon). However, in the October 22 Decision and Order, the FEA also determined that LL&E should be granted exception relief which permitted it to purchase 26,175 barrels per day of crude oil under the provisions of the FEA Crude Oil Buy/Sell Program. The present Appeal, if granted, would modify the October 22 Order and grant LL&E the particular form of exception relief which is originally requested.

LL&E is a Maryland corporation with its principal business operations located in New Orleans, Louisiana. The firm is engaged primarily in oil and gas exploration and in the development of its oil, gas, and industrial real estate properties. LL&E's major oil and gas producing property interests are in southern Louisiana, the Gulf of Mexico off the Louisiana coast and in northwestern Florida.

In early 1973, LL&E initiated plans for the construction of a 30,000 barrel per day refinery located in Mobile, Alabama. By January 1974, the firm had incurred cash expenditures of approximately xxxxx and contractual commitments in excess of xxxxx for acquisition of refinery components. Construction of the Mobile facility was completed in September 1975 at a total cost of xxxxx and the refinery was scheduled to commence operations in late October 1975.

In constructing the new refinery, LL&E anticipated that the crude oil feedstocks would consist exclusively of the 30,000 barrels per day of crude oil which the firm owns and produces from the Jay Field in northwestern Florida (Jay crude). On December 1, 1973, however, LL&E was selling its Jay crude production to Exxon and, as a result, LL&E is obligated under the provisions of Section 211.63(a) to continue to sell the crude oil involved to Exxon.[1]

In considering LL&E's exception application, the FEA determined that: (i) the firm had begun construction of its refinery prior to the inception of the Mandatory Allocation Program; (ii) the refinery was designed to process crude oil from the Jay Field and the use of other crude oil would reduce the operating efficiency and economic viability of the refinery; and (iii) LL&E had been unable to secure alternate crude oil supplies and even if such supplies were available, substantial additional expenditures would be required before the Mobile refinery could receive or refine them. Under these circumstances, the FEA concluded that

[1] The provisions of 10 CFR 211.63(a) generally require that all supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on December 1, 1973 shall remain in effect for the duration of the Mandatory Petroleum Allocation Program.

LL&E's investment in the refinery would be unproductive in the absence of exception relief and that it would therefore be inequitable to deny LL&E access to Jay Crude oil.

The FEA also determined, however, that the relief requested by LL&E could impose a burden upon Exxon and was therefore inappropriate. The relief formulated by the FEA resulted in an increase in the allocation which LL&E is entitled to receive under the Buy/Sell List. 10 CFR, 211.65. In this regard, the FEA stated that:

> . . . The loss of the crude oil requested by LL&E (which amounts to some 10,950,000 barrels per year) would necessarily impose certain burdens upon Exxon. By comparison, under the provisions of 10 CFR 211.65(b) increased allocations under the Crude Oil Buy/Sell Program attributable to the construction of new refining capacity by small and independent refiners are distributed on a proportionate basis among all refiner-sellers. In so doing, the FEA has attempted to strike a balance between the need to encourage refining expansion by small and independent refiners and the concomitant need to provide adequate crude oil supplies for such expansion by equitably distributing the resulting burden upon all refiner-sellers. *Louisiana Land, supra,* at 84,117. Footnote omitted.

In its Appeal, LL&E alleges that the FEA erred in law by denying the firm exception relief from the December 1 Rule. The firm asserts that the October 22 Decision is inconsistent with the FEA's decisions in *Famariss Oil and Refining Co./Navajo Refining Co.,* 1 FEA ¶ 20,629 (July 22, 1974); and *Saber Refining Co.,* 1 FEA ¶ 20,736 (December 13, 1974).

There is some merit to LL&E's contention that the FEA did not properly apply the precedents established in

Famariss and *Saber* to this case. In the *Famariss* case, the FEA granted exception relief from the December 1 Rule based on its determination that: (i) both Famariss and Navajo had constructed new and expanded refinery facilities in reliance upon an agreement with the State of New Mexico which would enable them to purchase certain State royalty crude oil; (ii) their investments were made prior to the promulgation of the FEA Regulations; (iii) the loss of the crude oil involved would have jeopardized the operation of the new refineries in a manner which was contrary to the objective of encouraging the expansion of domestic refining capacity; and (iv) in view of the capital investment which the two firms had made, deprivation of the royalty oil would have resulted in a serious financial hardship. Similarly, in the *Saber* case, the FEA found that the firm had invested a considerable amount of capital in order to renovate and expand its refinery operation and that the investment was made under the reasonable expectation that the firm would receive an assured supply of crude oil from the United States Geological Survey (USGS). In granting exception relief from the December 1 Rule, the FEA, also found that Saber made a strong showing that it would experience financial and operating difficulties unless it were allowed to receive the crude oil which it had previously contracted to purchase. In both the *Famariss* and *Saber* cases, the FEA concluded that the application of the provisions of Section 211.63(a) to the firm involved resulted in a gross inequity.

LL&E's contention that the principles enunciated in *Famariss* and *Saber* are dispositive of the LL&E case is not wholly persuasive. In *Famariss*, for example, the firms involved had made very substantial capital expenditures

prior to December 1, 1973 and refinery construction was well under way prior to the imposition of the relevant FEA Regulations. LL&E has failed to make this type of showing and cannot demonstrate, to the same degree found in *Famariss*, that it proceeded with its refinery construction upon a reasonable reliance on continued access to the crude oil in question.

Nevertheless, LL&E has established the existence of a number of other important factors which bear upon the issue of whether the type of exception relief which was approved in *Famariss* and *Saber* should also be granted in this case. As stated above, LL&E was producing Jay crude oil prior to the promulgation of the December 1 Rule. The firm is also currently continuing its production efforts and would use the Jay crude oil in its Florida fields in its own refinery if it were not prevented from doing so by the operation of the December 1 Rule. Moreover, prior to January 15, 1974, when the December 1 Rule was promulgated, LL&E planned and took the initial steps to build a refinery, on the basis of its ownership of the Jay crude oil field. In doing so the firm relied on its ability which certainly existed at the time to use the Jay crude oil which it owned in the refinery it was planning to build. In fact, the structure of the refinery itself was specifically designed to operate efficiently only with Jay crude oil as a feedstock.

LL&E also committed significant financial resources to the construction of the refinery prior to the promulgation of the December 1 Rule. As indicated above, the firm had expended over a quarter of a million dollars on preparatory work and had executed contractual commitments totaling

over $1.9 million for necessary equipment purchases prior to the date on which the December 1 Rule became effective.

Moreover, LL&E continued construction of its refinery without interruption from 1973 until the facility was completed in late 1975. The firm made continuous and substantial expenditures throughout that period, and did not condition the construction of the refinery upon a prior assured source of crude oil from the FEA. *Cf. Quintana-Howell Joint Venture*, 2 FEA ¶ 80,556 (March 17, 1975).

The construction of LL&E's new refinery also furthers important national energy objectives. The Congress has expressly stated that the expansion of domestic refining capacity is a major national policy objective:

> The Conferees view the construction of new refineries and the expansion of present refinery capacity, as suitably important factors in maximizing the amount of petroleum products available to meet domestic demand. (Conference Rep. No. 93-628, 93rd Cong., 1st Session, 20 (1973).)

On a number of previous occasions, the FEA has granted exception relief from FEA Regulations when it found that the regulatory requirements unduly impeded a firm's ability to expand refining capacity or build a new refinery in a particular factual setting. *See, e.g., Placid Ref. Co.*, 3 FEA ¶ 80,526 (December 10, 1975); *Gulf Energy and Development Corp.*, 2 FEA ¶ 80,516 (January 29, 1975); and *Apco Oil Corp.*, 1 FEA ¶ 20,750 (December 23, 1974).

A further important factor in this case is LL&E's status as an independent firm seeking to enter the refining sector of the petroleum industry. In the Emergency Petroleum Allocation Act of 1973 (EPAA), as amended, the Congress not only emphasized the "priority need to foster competi-

tion . . . and to preserve the competitive viability of independent refiners . . ." [EPAA, Section 4(b)(1) (D)], but also directed the FEA to make "such adjustments in the allocations of . . . crude oil . . . to take into consideration market entry by independent refiners . . . during or subsequent to calendar year 1972 . . ." [EPAA, Section 4(c)(4)].

In view of the particular factual circumstances present in this matter, and in further view of the fact that the important policy objectives specified above would be frustrated in the absence of relief, the FEA reaffirms its initial finding that a gross inequity exists in the present case. We have further determined that although the precedents established in *Famariss* and *Saber, supra*, are not directly controlling in this instance, the factors which do exist in this case as discussed above constitute strong reasons why the specific type of relief granted to Famariss and Saber should also be afforded to LL&E. The October 22 Decision and Order issued to LL&E should therefore be modified so as to permit the firm to retain for use in its Mobile, Alabama refinery the crude oil which it produces from the Jay field. Accordingly, the relief previously afforded LL&E in the October 22 Order will be modified to permit the firm to receive crude oil under the provisions of Section 211.65 only through February 29, 1976. After that date, LL&E shall be deemed the December 1 purchaser of an amount of Jay crude oil which is sufficient for the firm to operate its refinery at the national supply to capacity ratio. This quantity shall be reduced to reflect any crude oil which has already been awarded to LL&E under the Royalty Crude Oil Program administered by the United States Geological Survey.

In its Appeal, LL&E also alleges that the FEA erred in the previous Order by granting relief on the basis of 87.25 percent of its refining capacity rather than 100 percent of

its refinery capacity. In the October 22 Order, the FEA approved relief necessary to permit LL&E to operate at the national supply to capacity ratio. LL&E has made no showing that additional crude oil is warranted. Any exception relief which permitted LL&E to operate at levels in excess of the national supply to capacity ratio would confer an undue advantage on LL&E and would therefore be inappropriate. The additional relief which LL&E requests should therefore be denied.

In its comments on LL&E's submission, Exxon contends that if the LL&E Appeal is granted, Exxon would be required to bear a disproportionate burden of the exception relief granted to LL&E since it would be deprived of a significant quantity of Jay crude oil which it would be required to replace with more costly foreign crude oil. Under similar circumstances the FEA has granted relief. Following the decision in *Famariss*, Continental Oil Company was granted exception relief modifying its sales obligations under the Crude Oil Buy/Sell Program to reflect its reduced crude oil supply which resulted from the FEA exception decision. *Continental Oil Co.*, 2 FEA ¶ 80,503 (January 7, 1975). If it wishes to do so, Exxon may certainly file a separate exception application in which it fully documents any assertion that it falls under the *Continental Oil* precedent and that similar exception relief should be approved.

It Is Therefore Ordered That:

(1) The Appeal filed by Louisiana Land and Exploration Company be and hereby is granted as set forth below in paragraphs (2) through (5).

(2) Paragraph (3) of the Decision and Order issued to Louisiana Land and Exploration Company on October 22,

1975 be and is hereby deleted and the following paragraph inserted in its place:

> (3) Notwithstanding any contrary provisions of 10 CFR, Part 211, or the Order issued to the Louisiana Land and Exploration Company on September 26, 1975, LL&E shall be permitted to purchase during the crude oil allocation quarter ending February 29, 1976, a sufficient amount of crude oil produced from the Jay-Little Escambia Creek Field in the State of Florida to permit the firm to operate at the national supply capacity ratio from the date it commences operation of its Mobile, Alabama refinery until the effective date of this Order. During the period beginning with the effective date of this Order through August 31, 1976, Louisiana Land and Exploration Company shall be deemed to be the December 1, 1973 purchaser of 26,175 barrels of crude oil per day produced from the Jay-Little Escambia Creek Field. Effective May 1, 1976, the quantity of crude oil referred to in the preceding sentence shall be reduced by an amount equal to the quantity of crude oil to be received by Louisiana Land and Exploration Company under the Royalty Oil Program of the United States Geological Survey as permitted by 10 CFR 211.63(a) (4).

(3) Paragraph (4) of the October 22, 1975 Order is amended by deleting the phrase "December 1, 1975 through May 31, 1976" and substituting "December 1, 1975 through August 31, 1976."

(4) Paragraph (6) of the October 22, 1975 Order is modified by substituting "August" for "May" and "July" for "April."

(5) This is a final order of the Federal Energy Administration of which any aggrieved party may seek judicial review.

2 FEA ¶ 83,275 (October 10, 1975)

Delta Refining Company, Memphis, Tennessee (Case No. FEE-1854, Filed 8-1-75, Decided 9-11-75).

[*The original of this document contains information which is arguably confidential under 18 U. S. C. 1905. Such material has been deleted and is replaced by x's.*]

On March 28, 1975, the Federal Energy Administration issued a Decision and Order to the Delta Refining Company (Delta) which granted the firm exception relief from the provisions of 10 CFR 211.67 (the Old Oil Entitlements Program).[1] *Delta Refining Co.*, 2 FEA ¶ 83,078 (March 28, 1975). In that Decision, the FEA determined that in order to alleviate the serious hardship which Delta would experience as a result of the Entitlements Program, exception relief should be extended to the firm which would reduce the number of entitlements which Delta would otherwise be required to purchase on a monthly basis by 89.74 percent. The FEA further determined that such exception relief would be effectuated by requiring that the old oil receipts which Delta reports to the FEA on Form FEA P-102-M-O be reduced by 21.35 percent for the purpose of calculating Delta's entitlement purchase obligation.[2]

The March 28 Order which the FEA issued to Delta stated that the exception relief granted would expire on June 30,

[1] For a full discussion of the Entitlements Program, see *Mohawk Petroleum Corp.*, 2 FEA ¶ 83,049 (February 24, 1975); *Cities Service Co.*, 2 FEA ¶ 83,043 (February 20, 1975); *Marathon Oil Co.*, 2 FEA ¶ 85,004 (January 23, 1975); and *Pasco, Inc.*, 2 FEA ¶ 83,021 (January 20, 1975).

[2] The exception relief which was granted to Delta on March 28 was based on an entitlement value of $6.00. On June 6, 1975, the FEA issued a Supplemental Order to Delta in which the FEA directed that the old oil receipts reported by Delta be reduced by 21.69 percent to reflect the increase in the value of an entitlement to $7.31. *Beacon Oil Co., et al.*, 2 FEA ¶ 87,009 (June 6, 1975).

1975, but also provided that Delta might apply for an extension of exception relief. Under the terms of the Order, any request for an extension of exception relief would be based on a representation by the firm that the financial and operating conditions which were set forth in the March 28 Order and which formed the basis of the relief granted, would continue to exist after June 30, 1975. The Order also required that any such request for extension be accompanied by market survey data which demonstrated that Delta would not be able to increase its selling prices so as to reflect its entitlement purchase expenses and still maintain its historic market position.

On June 2, 1975, Delta filed an Application in which it requested that the relief provided in the March 28 Order be extended for an additional period of time. In connection with its application, Delta submitted market survey data which made a *prima facie* showing that at the time the firm was not reasonably able to recover entitlement costs by increasing the selling prices of the products which it refines. On the basis of the data which Delta provided and market data which the FEA obtained through a survey which it conducted, the FEA determined that the exception relief previously granted should be extended for a further limited period of time. Therefore, on July 9, 1975, the FEA issued a Decision and Order to Delta which extended the exception relief previously granted the firm until August 31, 1975.[3] *Delta Refining Co.*, 2 FEA ¶ 83,212 (July 9, 1975).

[3] The exception relief which was granted to Delta on March 28 was based on an adjusted national old oil supply ratio of 40 percent. On July 25, 1975, the FEA issued a Supplemental Order to Delta in which it directed that the old oil receipts reported by Delta for the month of June be reduced by 25.14 percent based on the FEA's determination that the national old oil supply ratio will average 38 percent, rather than 40 percent, in 1975. *Beacon Oil Co., et al.*, 2 FEA ¶ 87,012 (July 25, 1975).

In that Order, the FEA directed the firm to submit detailed financial, operating and market survey data on or before July 31, 1975 and indicated that the firm could at that time request an additional extension of exception relief.

On August 1, 1975, Delta filed an Application in which it requests that the exception relief granted to it on July 9 be extended. In its present submission, Delta asserts that its profit margin subsequent to the month of August 1975 will be significantly lower than its historical profit margin in the absence of continued relief. Delta therefore contends that exception relief is warranted in order to permit the firm to maintain its historical operating posture.

As indicated above, the FEA's March 28 decision to grant exception relief to Delta was based on its determination that the application of the provisions of Section 211.67 to the firm would result in a serious hardship. The type of analysis which the FEA performed in Entitlements Program exception applications filed by small refiners required to purchase entitlements and which led to the conclusion that exception relief should be granted to Delta has been described in a Decision and Order which the FEA issued to the OKC Corporation on June 5, 1975. In that Decision, the FEA stated that:

> In making a judgment as to a firm's historic financial and operating posture for purposes of assessing the effect of the Entitlements Program on that firm, it is generally necessary to examine the firm's performance over a relatively long period of time in order to obtain a meaningful comparison of the firm's "normal" operations and its operations as a result of the Entitlements Program. Accordingly, a seven year period has been used wherever possible for this comparison. *See, e.g., Laketon Asphalt Refining Co., Inc.*, 2 FEA ¶ 83,088 (March 28, 1975); *Beacon Oil Co.*, 2 FEA ¶ 83,060 (March 12,

> 1975); *Delta Refining Co.*, 2 FEA ¶ 83,078 (March 28, 1975); *Newhall Refining Company, Inc.*, 2 FEA ¶ 83,092 (March 28, 1975); and *Lunday-Thagard Oil Co.*, 2 FEA ¶ 83,089 (March 27, 1975). In addition, an arithmetic rather than a weighted average of the period of time involved is also used in order to offset the anomalous financial results which were present during 1973 and 1974 as a result of the Arab Oil boycott, the acute energy shortages which the nation experienced and the effect of the two-tier pricing system. . . . *OKC Corp.*, 2 FEA ¶ 80,604 (June 5, 1975).

In cases such as the Delta application where a showing was made that the projected profit margin would be lower than the historic profit margin, the FEA generally granted exception relief so as to prevent the requirements of the Entitlements Program from adversely affecting a firm by increasing its costs to a level which would preclude it from operating in a manner consistent with its historic level of operations and achieving the arithmetic average profit margin which it realized during the previous seven years. In granting such relief, the FEA pointed out that small refiners belong to a limited class entitled to special protection under the Emergency Petroleum Allocation Act of 1973 (EPAA), as amended, and that in Section 4(b) (1) of the EPAA the Congress specified that the FEA shall, to the maximum extent practicable, provide as a priority matter for the preservation of the competitive viability of small refiners. The FEA found, in cases such as Delta's that this goal would be frustrated in the absence of exception relief.

On August 4, 1975, the FEA published a notice of its intention to modify the standards discussed above which it previously applied in considering applications by small refiners for exception relief from purchase obligations under

the Entitlements Program.[4] *See* 40 Fed. Reg. 33489 (August 8, 1975). In the Notice, the FEA stated that:

> During the current period of rising crude oil costs and rising prices for refined petroleum products, the exclusive use of a profit margin test which is based on sales and pre-tax income may produce anomalous results and fail to assess in as meaningful a manner as possible the firm's historic operating and financial posture and its present financial position as a result of the Entitlements Program. Consequently, the FEA proposes to base future exception relief from the Entitlements Program on an assessment of each small refiner's return on invested capital or alternatively its return on stockholders' equity, as well as the pre-tax profit margin which it has achieved in the past and projects it will realize in the immediate future.
>
> The FEA believes that use of this additional standard is appropriate since both the return on invested capital and on stockholders' equity are commonly utilized methods of comparing the effectiveness of a firm's use of its capitalization over time and would provide an additional basis upon which the impact of the Entitlements Program on a particular firm could be measured.

The FEA therefore proposed that exception relief be extended to small refiners so as to alleviate the adverse impact of the Entitlements Program which would otherwise prevent the firm from achieving the lesser of its historic profit margin or the arithmetic average of the return on invested capital or stockholders' equity which it realized during the best four of its previous seven fiscal years. As indicated in the Notice, the FEA's proposal to utilize a re-

[4] For the full text of the FEA's August 4 Notice, see Fed. Energy Guidelines ¶ 17,401.

turn on invested capital or return on stockholders' equity standard in addition to the profit margin standard which it previously utilized was based on its judgment that the use of a profit margin test alone could produce anomalous results and that the use of a return on invested capital or return on stockholders' equity test would provide an additional basis upon which to evaluate the effect to the Entitlements Program on a firm. However, in view of the fact that an additional restriction would be imposed, it was the FEA's judgment that this additional standard should not be inordinately burdensome and should therefore be based on the arithmetic average of the returns realized by a firm in the best four of its past seven fiscal years. The FEA anticipated that the use of the profit margin standard in conjunction with the return on invested capital standard would provide an appropriate measure of a firm's historic operating posture and its current and projected position under the Entitlements Program. Additionally, the FEA indicated in the Notice that it would also take into account unusual circumstances such as insufficient cash flow from operations and the lack of historical operating data in determining the extent of relief to be provided.

Finally, the FEA proposed to continue to consider the petroleum refining and marketing operations of a firm in evaluating its historic and current financial posture but indicated that small refiners which are engaged in crude oil production activities would be requested to eliminate those activities from the financial data presented to the FEA in connection with applications for exception relief from the

provisions of Section 211.67. This proposal was based on the fact that the Entitlements Program applies to refining operations and the primary purpose of the Program is to reduce crude oil cost disparities among domestic refiners. However, the FEA recognized that in almost all cases refiners are engaged in marketing activities which are interwoven with their refining operations and which are not easily separated from those operations. Moreover, in view of the varying methods which a firm might utilize to establish transfer prices and allocate costs between its refining and marketing operations, any attempt to segregate the financial results of those operations might not produce an accurate picture of the firm's operating posture. Therefore, the FEA determined that, as a general rule, it would consider both the refining and marketing activities of a firm in analyzing requests by small refiners for exception relief from the purchase requirements of the Entitlements Program. On the other hand, the relatively few small refiners who are also involved in crude oil production should be able to readily separate the financial results of the two operations. In view of this situation and in view of the FEA's belief that the inclusion of its operating results of production activities might distort the financial position of the refining and marketing operations and serve as a disincentive to the expansion of production activities, the FEA determined that as a general rule small refiners should exclude production activities from the financial data furnished in connection with exception applications.

As the August 4 Notice indicated, the FEA invited any interested party to submit written material commenting on the

proposed standards to be used in evaluating Applications for Exception submitted by small refiners from their purchase obligations under the Entitlements Program. A number of comments were received and considered. Several firms which submitted comments stated that a return on invested capital standard should be used in preference to the alternative posed in the Notice of return on stockholders' equity. According to these comments, a firm might change the extent to which it relies on equity as opposed to debt financing in any given year. A standard based on return on stockholders' equity alone would under these circumstances produce distorted results in any comparison of several years. On the other hand, a standard based on return on invested capital would automatically eliminate any distortion that resulted from the use of debt rather than equity financing and would produce meaningful balance sheet comparisons. After considering those comments as well as other comments submitted by interested parties, it is the judgment of the FEA that the proposed criteria which were promulgated in the Federal Register Notice should be adopted with the use of a return on invested capital rather than a return on stockholders' equity standard. It is our judgment based on reasons stated in the Notice that the use of these criteria would result in a fair and equitable resolution of Entitlements Program exception applications submitted by small refiners who are obligated to purchase entitlements.

Before analyzing Delta's present Application for Exception in view of the criteria discussed above, it would be useful to review certain financial data which Delta presented

in connection with its initial request for exception. At the time it filed that initial application, Delta projected that it would be required to purchase entitlements at a total cost of $7,901,519 during its four fiscal quarters ending November 30, 1975 based on the assumptions that the value of an entitlement would be $6.00 and that the adjusted national old oil supply ratio would be 40 percent. Delta also indicated that it would be unable to increase its selling prices in order to recoup the cost of its entitlement purchase obligations and that it would therefore be required to absorb the entire $7.9 million expense. As a result, the firm projected that, in the absence of exception relief, it would achieve a profit margin of only xx percent for the twelve months ending November 30, 1975, a figure substantially lower than the average profit margin of xx percent which the firm realized in its 1968 through 1974 fiscal years. The FEA therefore granted exception relief to Delta in order to alleviate the hardship which would result to the firm as a consequence of the Entitlements Program and to permit the firm to operate in the twelve months ending November 30 in a manner which reflects its historical performance.

In evaluating Delta's initial exception application, the FEA considered only the firm's refining operations. However, in view of the FEA's determination that a firm's petroleum refining *and* marketing activities should be considered in assessing the firm's historic and current financial posture, the FEA requested Delta to provide data which includes the financial results of Gasoline Marketers, Inc. (GMI), a subsidiary of Delta's parent firm, Earth Resources Com-

pany, which is engaged in marketing gasoline. The data which the firm has submitted indicates that on a consolidated basis Delta and GMI have realized the following levels of profitability:

TABLE A

Historical Profitability of Delta and GMI

$000

FYE August 31	*Net Sales*	*Pre-Tax Income*	*Profit Margin*
1968	$	$	%
1969			%
1970			%
1971			%
1972			%
1973*			%
1974			%

*GMI included for eight and one-half months subsequent to its acquisition. The arithmetic average profit margin for Delta and GMI for the seven years shown above were ...... percent.

Delta has also submitted data which indicates that Delta and GMI have achieved the following returns on invested capital:

TABLE B

Historic Return on Invested Capital
$000

FYE August 31	*After-Tax Income Plus Interest On Long-Term Debt*	+ *Average Capital***	= *ROIC*
1968	$	$	%
1969			%
1970			%
1971			%
1972			%
1973***			%
1974			%

** Average capital is the sum of the long-term debt and stockholders' equity at the beginning and end of the fiscal year divided by two. Since figures for Delta's 1968 beginning year capital were not available, the FEA computed Delta's 1968 beginning year capital by subtracting the firm's after-tax income from its capital at the end of the year.

*** GMI included for eight and one half months subsequent to its acquisition.

The arithmetic average of the four highest returns on invested capital shown in Table B above is XXX percent.

As discussed above, the FEA has determined that exception relief from the purchase requirements of the Entitlements Program will generally be granted to small refiners if the application of the Program's requirements would otherwise prevent the firm from achieving the lesser of its historic profit margin or its historic return on invested capital in

1975.[5] The application of these standards to the present Delta application indicates that further exception relief is not warranted at this time.

Since the inception of the Entitlements Program, Delta has generally been a seller of entitlements. Table C below sets forth the firm's experience under the Program as of the present date:

TABLE C

Delta's Obligations Under the Entitlements Program

Month in Which Transaction Occurred	*Number Sold/(Purchased)*	*Entitlement Revenue/(Expense)*
January	(17,762)	$ (88,810)
February	19,573	97,865
March	(30,767)	(184,602)
April	118,979	803,108
May	18,408	134,562
June	(51,768)	(377,389)
July	66,016	487,858
August	27,506	215,097
		$1,087,689

As Table C indicates, during the period January through August, Delta received over $1.08 million as a result of the operation of the Entitlements Program and the exception relief which was afforded to the firm. As a consequence of its receipt of these revenues from the sale of entitlements,

[5] Since Delta's fiscal year ends on August 31, the FEA has utilized the firm's four quarters ending on November 30, 1975 for purposes of evaluating the impact of the Entitlements Program on Delta and GMI.

Delta has achieved a significantly higher level of profitability in 1975 than it originally projected when it first submitted its exception application. For the six month period ended May 31, 1975, Delta and GMI realized pre-tax income of $XXXXX on net sales of $XXXXX. Moreover, Delta and GMI anticipate that they will earn $XXXXX on net sales of $XXXXX for the three months ending August 31, 1975,[6] and $XXXXX on net sales of $XXXXX for the three months ending November 30, 1975 assuming that the firm does not receive further exception relief and is required to purchase entitlements at a cost of $XXXXX during that three month period.[7] Delta therefore projects that it will achieve the following level of profitability for the twelve months ending November 30, 1975:

TABLE D

Projected Profitability of Delta and GMI
Assuming Additional Relief is Denied

Net Sales	$ XXXXX
Costs and Expenses	XXXXX
Pre-Tax Income	XXXXX

The profit margin which Delta and GMI would realize for the twelve month period ending November 30 based on

[6] The firm's pro-forma income statement for the three months ending August 31 was adjusted to reflect Delta's actual entitlement sales in the months of July and August rather than the projected entitlements which it anticipated it would sell.

[7] The entitlements expense which the firm projects it will incur during the three month period ending November 30 is based on the assumptions that the national old oil supply ratio is 38 percent and the value of an entitlement is $7.82.

the projected financial results set forth in Table D is XX percent, a figure which exceeds their historic profit margin of XX percent. Moreover, the financial data which the firm has submitted indicates that even in the absence of continued exception relief Delta and GMI will achieve a return on invested capital of XX percent for the twelve month period,[8] a return which is higher than their historic return on invested capital of XX percent. In view of the fact that Delta and GMI will attain a level of profitability for the twelve months ending November 30, 1975 which exceeds their historic profit margin and return on invested capital, the application of the Entitlements Program to Delta at this time does not result in a serious hardship and further exception relief is not appropriate.

It should also be noted that the income level which Delta projects it will earn in the three months ending November 30 reflects the firm's assumption that it will be unable to increase its selling prices to recoup the cost of its anticipated entitlement purchase obligations. However, the data which Delta has provided in connection with its request for an extension of exception relief does not fully support that assumption. For example, market survey data submitted by the firm indicates that in the month of June 1975 Delta's wholesale rack price for regular grade motor gasoline was equivalent to the average price charged by seven of its inde-

[8] Return on invested capital has been calculated in the following manner: The pre-tax income figure shown in Table D was converted to after-tax income by applying the tax rate reflected on the consolidated income statement for Delta and GMI for fiscal year 1974 (xx percent). Capital for the beginning of the twelve month period was derived by subtracting the projected after-tax income from the projected capital at the end of the period. Finally, after-tax income plus the firm's projected interest on long-term debt for the period were divided by the average capital for the period.

pendent competitors. However, in the month of July Delta's price for the same product was 1.25 cents per gallon lower than the average price charged by those seven competitors. Moreover, data which the firm has submitted to the FEA on its Forms FEO-96 for the months of May, June and July indicates that Delta has had little or no difficulty in passing through its increased product costs in its sale of refined petroleum products. It is therefore likely that the firm will be able to recover at least a portion of the cost of purchasing entitlements by increasing its selling prices.

Based on the considerations set forth above, and the data submitted by Delta in connection with its Application for Exception, the Federal Energy Administration has concluded that Delta has failed to demonstrate that the application to it of the provisions of 10 CFR 211.67 results in a serious hardship or gross inequity.

It is Therefore Ordered That:

(1) The Application for Exception from the provisions of 10 CFR 211.67 filed by the Delta Refining Company on August 1, 1975 be and hereby is denied.

(2) In accordance with the provisions of 10 CFR, Part 205, any aggrieved party may file an appeal from this Decision and Order with the Federal Energy Administration. The provisions of 10 CFR, Part 205, Subpart H, set forth the procedures and criteria which govern the filing and determination of any such appeal.

FEDERAL ENERGY ADMINISTRATION
WASHINGTON, D.C. 20461

APR. 9, 1976

DECISION AND ORDER*
OF THE FEDERAL ENERGY ADMINISTRATION

Application for Exception

Name of Petitioner:	Placid Oil Company
Date of Filing:	December 5, 1975
Case Number:	FEE-2112

On December 5, 1975, Placid Oil Company (Placid) filed an Application for Exception from the provisions of 10 CFR 211.63(a) and 211.65 with the Office of Exceptions and Appeals of the Federal Energy Administration. The exception request, if granted, would permit Placid to retain and utilize in a refinery which the firm recently acquired 17,000 barrels per day (BPD) of crude oil which the firm is presently required to sell to other refiners pursuant to the requirements set forth in Section 211.63(a).[1] The exception application, if granted, would also exempt Placid from the requirement that it pay a handling charge of 30 cents per

[1] The provisions of 10 CFR 211.63(a) generally require that all supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on January 1, 1976, shall remain in effect for the duration of the Mandatory Petroleum Allocation Program. 41 Fed. Reg. 7386 (February 18, 1976). Prior to its amendment in February 1976 in accordance with the provisions of the Energy Policy and Conservation Act, Section 211.63(a) required that all supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on December 1, 1973, remain in effect for the duration of the Allocation Program. *See* 41 Fed. Reg. 2830 (January 20, 1976). For a full discussion of the legislative and regulatory history underlying Section 211.63(a), *see Condor Operating Company*, 1 FEA Par. 20,148 (September 18, 1974); and *Condor Operating Company*, 1 FEA Par. 20,661 (September 12, 1974).

* This document contains information which is arguably confidential under 18 U.S.C. 1905.

barrel for an additional 7,475 BPD of crude oil which the firm obtains pursuant to the provisions of Section 211.65 (the Crude Oil Buy/Sell Program).[2] On February 25, 1976, Placid completed its submission of certain additional information which was essential for an analysis of the firm's exception application. At the firm's request, a conference was held with the FEA on March 25, 1976, to discuss the firm's Application.

Placid is an independent producer of crude oil and natural gas. The firm produces more than 32,000 BPD of domestic crude oil. On December 1, 1973, Placid was selling its entire production of crude oil to other firms under a variety of contractual agreements. Pursuant to the FEA Regulations, Placid was also selling this crude oil to these firms on January 1, 1976. As a result, Placid is obligated under the provisions of Section 211.63(a) to continue to sell the crude oil involved to those firms for the duration of the Mandatory Petroleum Allocation Program.

On December 30, 1974, Placid, through a wholly-owned subsidiary, Placid Refining Company (Placid Refining), acquired a refinery at Port Allen, Louisiana, from Ryder System, Inc. (Ryder).[3] The Port Allen refinery has a

[2] For a description of the Crude Oil Buy/Sell Program, *see* *Champlin Petroleum Company*, 2 FEA Par. 80,595 (May 22, 1975); *Getty Oil Company (Eastern Operations), Inc.* and *Skelly Oil Company*, 2 FEA Par. 83,148 (May 12, 1975); *Texaco, Inc. (Giant Industries, Inc.)*, 1 FEA Par. 20,184 (November 15, 1974); and *Union Oil Company of California*, 1 FEA Par. 20,628 (July 19, 1974).

[3] Prior to 1974, the Port Allen facility was owned by the Toro Petroleum Corporation (Toro) and consisted exclusively of a gasoline blending plant. In February 1974 Ryder acquired Toro and upgraded the Port Allen facility to permit refining operations. For a discussion of the history of the Port Allen facility, *see* *Placid Refining Company*, 3 FEA Par. 80,526 (December 10, 1975); and *Ryder System, Inc.*, 1 FEA Par. 20,742 (December 16, 1974).

certified capacity of 36,000 BPD of crude oil and is the only refinery operated by Placid. Placid is therefore a small and independent refiner as those terms are defined in 10 CFR 211.62. Placid Refining markets the gasoline, kerosene, diesel fuel, and fuel oil which it produces in Port Allen, Louisiana, and Baton Rouge, Louisiana, and in North Carolina.

In its exception application, Placid contends that the application of the provisions of the FEA Regulations to its subsidiary, Placid Refining, results in a serious hardship and gross inequity. Placid states that the FEA Regulations were not designed to accommodate a situation in which a producer of crude oil acquires a refinery subsequent to the implementation of the regulatory program. Placid points out that it produces more than enough crude oil to operate the refinery it owns, but that, pursuant to the provisions of Section 211.63(a), the firm is required to sell much of the crude oil it produces to other firms. In order to operate its Port Allen refinery, Placid states that it must therefore purchase a significant quantity of crude oil under the FEA Crude Oil Buy/Sell Program, which the firm asserts is substantially more expensive than the crude oil which it produces. The firm also contends that the crude oil which it has processed at its Port Allen refinery in its first ten months of operation has exceeded the national average cost of crude oil to all domestic refiners by 43 cents per barrel and that the price which it is able to charge for refined petroleum products in the areas in which the firm markets are significantly lower than the national average. Placid states that its refining and marketing operations have, as a result, incurred significant losses in their first year of operation, and projects additional losses in 1976.

In order to alleviate the serious hardship and gross inequity which Placid alleges it is incurring as a result of the

FEA Regulations, the firm requests that it be granted two types of exception relief. First, Placid requests that it be permitted to retain for use at its Port Allen refinery approximately 17,000 BPD of crude oil which it is currently required by Section 211.63(a) to supply to other firms. Placid claims that on December 1, 1973, the crude oil for which it requests exception relief was being supplied to other firms under short-term contracts which Placid should be permitted to terminate. The firm states that it never intended that these short-term contracts would establish permanent supplier/purchaser relationships with the purchasers of the crude oil. If Placid were permitted to retain this portion of its crude oil production, the firm asserts that its overall cost of crude oil would diminish significantly, since almost all of the crude oil which Placid requests that it be permitted to retain is low-priced, old domestic crude oil. In addition, the firm requests that it be relieved of the requirement that it pay a 30 cent per barrel handling fee for the crude oil which it receives under the Crude Oil Buy/Sell Program. Section 212.94(b) permits refiner-sellers to charge refiner-buyers such as Placid a 30 cent per barrel handling fee on all crude oil sold under the Program. Placid asserts that it is inherently unfair for the FEA Regulations to be applied in a maner in which it is required to supply other refiners with crude oil which it produces and for which it receives no special handling charge, while at the same time refiners which sell crude to it pursuant to the Crude Oil Buy/Sell Program are permitted to charge Placid a 30 cent per barrell handling fee. Placid also points outs that many of the firms to which it pays the 30 cent per barrel handling fee are the same firms to which it is required by Section 211.63(a) to sell the crude oil it produces. Placid states that if its two requests are granted the firm would begin to

realize a reasonable return on its investment in the Port Allen refinery.

The FEA Regulations define the term "firm" in Section 211.51 as:

> any association, company, corporation, estate, individual, joint-venture, partnership, or sole proprietorship or any other entity however organized . . . The FEA may, in regulations and forms issued in this part, treat as a firm:
>
> > (a) A parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls, (b) a parent and its consolidated entities, (c) an unconsolidated entity, or (d) any part of a firm. 10 CFR 211.51, 39 Fed. Reg. 35472 (October 1, 1974).

The FEA has consistently held, in analyzing a chain of serious hardship, that all petroleum-related operations of the entire firm must be considered. *See, e.g., Gulf Oil Corp.*, 3 FEA Par. 83,060 (December 31, 1975); *Kaibab Lubricating Specialists*, 2 FEA Par. 80,720 (October 30, 1975); *Sound Refining Inc.*, 2 FEA Par. 80,563 (April 3, 1975); *Page Airways, Inc.*, 2 FEA Par. 80,553 (March 18, 1975); *Esso Eastern, Inc.*, 1 FEA Par. 20,752 (December 23, 1974); *Esso Standard Oil S.A. Ltd.*, 1 FEA Par. 20,748 (December 20, 1974); and *Walter Simas/Simas Brothers*, 1 FEA Par. 20,738 (December 13, 1974). In order to analyze Placid's claim that its wholly-owned subsidiary, Placid Refining, is incurring a serious hardship as a result of the provisions of the FEA Regulations, the FEA therefore requested that Placid submit financial data for recent periods concerning its overall operations. In response to this request, Placid stated, "The FEA would be hampered in its assessment of the Port Allen refinery's financial position if Placid's total activities were included in the data submitted to the FEA."

Based on this assertion, Placid refused to provide any financial data other than historical and projected financial data relating to Placid Refining's operations. Since Placid has refused to provide the type of data which the FEA has used in previous cases to analyze claims of serious hardships, Placid has clearly failed to establish that exception relief is warranted in this situation based upon the precedents and analysis which the FEA has previously conducted. The exception relief which Placid requests on serious hardship grounds should therefore be denied.

It might also be voted that Placid's refusal to provide financial data for the entire firm is inconsistent with the very basis on which it requests exception relief. In its application, Placid asserts that the FEA regulatory program is producing a serious hardship because it prevents the firm from properly integrating its production and refining subsidiaries into a single unified operation. In order to evaluate this unsubstantiated contention, it would certainly appear to be essential to examine financial and operating data for the entire firm whose operations Placid seeks exception relief to coordinate.

Placid also asserts that in *Delta Refining Company*, 2 FEA Par. 83,275 (September 11, 1975), the FEA held that in considering exception applications submitted by small refiners on serious hardship grounds it would require that production operations be excluded from the financial data which the firm supplies. Placid's contentions are not correct and misconstrue the *Delta* determination. In *Delta*, the FEA clearly stated that the criteria established were intended to apply solely to the analysis of requests by small refiners for exception relief from the purchase requirements of 10 CFR 211.67 (the Old Oil Entitlements Program).[4] The Entitlements Program is designed to equi-

tably distribute the benefits of low-priced, old domestic crude oil among all domestic refiners, and thereby reduce significant price disparities which would otherwise exist among refiners for the refined petroleum products which they market. Thus, the Entitlements Program is intended to affect only a firm's refining and marketing operations. The Program was not designed to affect other aspects of a firm's activities. Furthermore, the FEA recognized in *Delta* that the entitlements expenditure requirements of the Entitlements Program could have a greater adverse affect on small refiners as a class than on other firms due to their small size and limited cash flow resources. The FEA therefore determined that under this unique set of regulatory requirements special treatment for all small refiners was necessary in order to avoid significant disincentives to the continuation and expansion of a firm's production activities and to prevent distortions which might otherwise result in the presentation of the financial position of a firm's refining and marketing operations. The FEA held that, in considering small refiner requests for exception from the Entitlements Program, the production activities of a firm should be excluded. The *Delta* standard was not, however, intended to apply to exception requests submitted by firms from provisions of the FEA Regulations other than the Entitlements Program. *See Martin Oil Service, Inc.*, 3 FEA Par. 87,003 (December 5, 1975).

In its exception application, Placid has submitted no reasons supporting its contention that its producing activi-

[4] For a full description of the Entitlements Program, *see, e.g., Delta Refining Company, supra; Mohawk Petroleum Corp.*, 2 FEA Par. 83,049 (February 24, 1975); *Cities Service Co.*, 2 FEA Par. 83,043 (February 20, 1975); *Marathon Oil Co.*, 2 FEA Par. 85,004 (January 23, 1975); and *Pasco, Inc.*, 2 FEA Par. 83,021 (January 20, 1975).

ties should not be considered by the FEA in evaluating the firm's claim of serious financial hardship. The FEA Regulations from which it seeks exception relief are general provisions affecting all firms equally. *See Martin Oil Service, Inc., supra.* As was the case with the regulatory requirement at issue in the *Martin Oil Service* case, the regulations from which Placid seeks relief impose no specific cash transfer requirements nor do they have an adverse impact on a specific class of firms having a protected status under the Emergency Petroleum Allocation Act. Finally, as discussed above, Placid's claim that the financial data relating to its production activities is not relevant to the analysis of its exception request is inconsistent with the basis on which it requests relief. The FEA Regulations from which it seeks an exception relate directly to the firm's production activities, in contrast to the Entitlements Program which deals only with a firm's refining and marketing activities.

Moreover, even the limited financial data which Placid did submit in its exception application strongly suggests that no showing can reasonably be made that any phase of Placid's operation is subject to a serious hardship as a result of the FEA regulatory requirements. Placid Refining purchased the Port Allen refinery from Ryder on December 31, 1974, for approximately $33,500,000, including marketing terminals valued at $3,450,000. Following its acquisition, Placid undertook a number of capital improvements designed to reduce the operating expenses of the refinery and improve its overall efficiency. The estimated cost of the capital improvements currently in progress is $7,500,000. In order to finance this investment, Placid Refining borrowed substantial sums from its parent, Placid. In fact, at the end of 1975, Placid Refining's outstanding long-term debt obligation to the parent firm was $43,890,500, which is more

than $1,000,000 greater than the firm's initial investment in the refinery operation. The income statement submitted for Placid Refining for the twelve month period ending December 31, 1975, the first twelve months in which the refinery was operated, does show a net loss of over $4,000,000. However, this loss includes interest payments made by Placid Refining to Placid on its long-term debt obligation. In considering Placid Refining's financial condition, this interest payment should properly be excluded, since it reflects a payment from a wholly-owned subsidiary to its parent, a completely internal transaction which merely reflects the manner in which the firm was initially capitalized (*i.e.*, heavily weighted toward debt rather than equity). *See NGL Supply, Inc.*, 3 FEA Par. 83,004 (November 14, 1975); and *Sound Refining, Inc., supra. See also* 10 CFR 211.51. If the payment is excluded, the financial data indicates that Placid Refining realized a net profit in its first year of operation.

Furthermore, the financial information which Placid provided indicates that Placid Refining's economic viability, even without additional support from its parent, is not in immediate jeopardy. The firm's current ratio (current assets divided by current liabilities) as of December 31, 1975, was 1.04. Its available cash was more than $2,600,000. Furthermore, the actual operating position of the refinery is even stronger than the financial statements suggest since the statements include as an expense item more than $2,000,000 for depreciation. As we have noted in a number of previous decisions, depreciation costs are not actual out-of-pocket costs for which the firm must currently expend funds and are therefore properly excluded in analyzing a claim of current serious financial hardship. *See, e.g., McCulloch Gas Processing Corporation*, 3 FEA Par. 83,003 (November 14,

1975); *Superior Oil Company*, 2 FEA Par. 83,271 (August 29, 1975); and *The Standard Oil Company*, 2 FEA Par. 83,111 (April 8, 1975). Depreciation charges also have no effect on a firm's current cash flow situation. When depreciation expenses are excluded from the firm's operating results in 1975, the firm actually realized a significant net income. Finally, Placid Refinery projects that in the twelve month period ending December 31, 1976, the firm will realize a substantially greater net income than it realized in 1975. Deducting the firm's interest expense on long-term debt held by the parent firm, Placid Refining projects that it will realize a net income of more than $1,000,000 in 1976. This figure includes an expense of more than $2,500,000 for depreciation during that year. If the depreciation expense is excluded, then Placid Refining's 1976 net operating income will be $3,605,000, which represents a return on its initial investment of approximately 8.8 percent in only the second year of operation.

As the data discussed above indicates, Placid Refining has achieved a moderate operating profit in its first year of operation. This situation has occurred even though it would be reasonable to expect that the Placid Refining financial results would show a net loss for 1975 in view of the inherent difficulties which a firm faces in a new endeavor of this magnitude, particularly in gaining market entry for the products which it produces and sells and in overcoming the normal and expected inefficiencies which are present whenever a new operation is begun. Moreover, Placid Refining projects a net operating profit of $3,605,000 in only its second year of operation. On the basis of this record there is no indication whatever that either Placid or even Placid Refining will encounter such severe financial difficulties as a result of the FEA regulatory program so as

to curtail any aspect of their operations, significantly affect in an adverse manner Placid's overall financial posture or seriously impair any aspect of Placid or Placid Refinery's business operations. *See, e.g., Gulf Oil Corp., supra;* and *Mobil Oil Corporation*, 1 FEA Par. 20,725 (December 2, 1974). *See also Quintana-Howell Joint Venture*, 2 FEA Par. 80,556 (March 17, 1975).

In its exception application, Placid also asserts that the application to it of Section 211.63(a) results in a gross inequity. The FEA has in the past granted exception relief to small refiners with new or expanded refinery capacity who demonstrated that the provisions of Section 211.63(a) when applied to them resulted in a gross inequity. *See Louisiana Land and Exploration Company*, 2 FEA Par. 83,339 (October 22, 1975); *Saber Refining Company*, 1 FEA Par. 20,736 (December 13, 1974); and *Famariss Oil and Refining Company; Navajo Refining Company*, 1 FEA Par. 20,629 (July 22, 1974). In each of these cases the conclusion that the firm would incur a gross inequity in the absence of exception relief was based upon similar findings. In concluding that the Louisiana Land and Exploration Company (LL&E) should be granted exception relief, the FEA determined that: (i) the firm planned and began constructing its new refinery prior to the implementation of the FEA Mandatory Petroleum Allocation Program (*see also Saber Refining Company, supra;* and *Famariss Oil and Refining Company; Navajo Refining Company, supra*); (ii) the firm's investment in a new refinery was made in reliance upon the assumption that LL&E would be able to utilize its own crude oil as the refinery's source of supply (*see also Ferguson Energy Corporation*, 2 FEA Par. 83,175 (June 13, 1975); (iii) LL&E's refinery was specifically designed to refine the firm's own "Jay Field" crude production and the utiliza-

tion of other types of crude oil would significantly reduce operating efficiences and adversely affect the refinery's economic viability; (iv) the utilization of other types of crude oil would also substantially alter LL&E's proposed refinery mix and hamper the firm's ability to market its refined petroleum products in a profitable manner; (v) despite diligent efforts by the firm, LL&E was unable to secure alternate crude oil supplies that could conceivably be utilized at the refinery or exchanged for Jay crude; (vi) even if alternate crude oil supplies were presently available for processing at the refinery, substantial additional expenditures would be required to enable the facility to receive and refine such crude oil; and (vii) in the absence of exception relief, LL&E would lack the sufficient and reliable source of crude oil necessary to commence refining operations and its investment would be rendered totally unproductive in the foreseeable future. Under these circumstances, the FEA determined that a gross inequity existed which warranted exception relief.

In its exception application, Placid contends that the factual situation which it faces is similar to that of LL&E and that similar exception relief should therefore be approved. However, the facts in this case fail to substantiate the Placid position. It should be noted at the outset that Placid acquired its interest in the Port Allen refinery *subsequent* to the implementation of the FEA Mandatory Petroleum Allocation Program. At the time it purchased the refinery, Placid was certainly aware of the existence of the FEA Regulations, and the impact that those regulatory requirements would have on the firm's planned operations. Yet, the firm made no attempt to obtain a clarification of its position prior to acquiring the refinery. As the FEA has stated in a similar situation:

> When Good Hope began its refinery expansion program, it did so with full knowledge of the criteria specified in Section 211.65(b) . . . As a general principle it is inappropriate for the FEA to grant exception relief to alleviate the adverse impact of a firm's discretionary business decision. This principle clearly applies in the present case. Notwithstanding the showing which it should have known it would be required to make to obtain crude oil under Section 211.65(b) and despite the fact that it made no efforts to satisfy important elements of those criteria, Good Hope nevertheless proceeded with its refinery expansion. The firm clearly decided to undertake a normal business risk, and it is not appropriate that exception relief be granted at this time to relieve the firm from the adverse consequences of the risk which it knowingly undertook. *Good Hope Refineries, Inc.*, 3 FEA Par. 83,025 (November 25, 1975).

See also Kaibab Lubricating Specialists, 2 FEA Par. 80,720 (October 30, 1975); *Crest Resources and Exploration Corporation*, 2 FEA Par. 80,641 (July 18, 1975); and *Clark Oil & Refining Corp.*, 2 FEA Par. 83,040 (February 12, 1975). In this case, Placid purchased the Port Allen refinery in December 1974 with full knowledge of the impact of the FEA Regulations on its planned operation of the refinery and on its crude oil sales obligations. Although the firm claims that it expected that the Emergency Petroleum Allocation Act of 1973 and the FEA Regulations would expire in February 1975, it surely realized that there was no certainty attached to its expectation and that it was knowingly undertaking a business risk. It is hardly reasonable for Placid to expect the federal government to now mitigate the consequence of the business risk which it consciously undertook and to do so by adversely affecting other firms and depriving them of the crude oil which they are entitled to receive under the FEA Regulations.

The factual situation which Placid faces also fails to meet the LL&E standard for additional reasons. Although the Port Allen refinery was specifically designed to process the crude oil which Placid produces, the firm has failed to demonstrate in its exception application that it has encountered any difficulty in obtaining alternative acceptable crude oil for processing during the one year period in which the refinery has been in operation. Placid has submitted no evidence to demonstrate that the continued utilization of the crude oil currently available to it will significantly reduce its operating efficiency, that any additional expenditures are required in order to process this available crude oil, or that the processing of this crude oil will hamper the operation of the refinery in any way. *See Louisiana Land and Exploration Company, supra;* and *Quintana-Howell Joint Venture, supra.* Finally, Placid has submitted no convincing evidence that the continuation of its processing of the crude oil currently available to it will adversely affect the refinery's economic viability. Although Placid has shown that its average cost of crude oil in its first ten months of operation has been somewhat above the national average cost of crude oil, the firm has not demonstrated that its cost of crude oil makes the operation of its refinery uneconomical. Indeed, the firm has indicated that the type of crude oil processed at its refinery is a "premium" crude oil which generally costs 40 to 50 cents per barrel more than the national average cost of crude oil. This high quality sweet crude oil should permit the firm to operate its refinery at a lower cost than firms which refine lower quality (and therefore lower priced) crude oils. It should also be noted that the FEA has stated in several prior Decisions that the FEA's regulatory progrm is not designed to entirely eliminate crude oil differentials among all refiners. *See, e.g., Hawaiian Independent Refinery, Inc.,* 2 FEA Par. 80,710

(October 21, 1975); and *Commonwealth Oil Refining Company, Inc.,* 2 FEA Par. 83,230 (August 7, 1975). Placid has therefore failed to demonstrate that its factual situation is similar in any significant respect to that of LL&E. Nor has The firm shown the manner in which the provisions of Section 211.63(a) adversely affect its operations to such a unique extent as to warrant exception relief.

In its exception application, Placid also requests exception relief from the requirements of Section 212.94(b) which permit firms which sell crude oil pursuant to the FEA Crude Oil Buy/Sell Program to charge refiner-buyers a handling fee of 30 cents per barrel. Placid contends that the requirement that it pay the 30 cent handling fee on each barrel of crude oil which it purchases through the Crude Oil Buy/Sell Program results in a serious hardship and gross inequity to the firm. Placid claims that it is inherently unfair for it to be required to pay a handling fee to some of the same firms to which it sells the crude oil which it produces. Placid also contends that, if it were relieved of its obligation to pay the handling fee, the cost differential between its average cost of crude oil and the national average cost of crude oil would be virtualy eliminated.

Placid has failed to substantiate its claim of serious hardship or gross inequity. As discussed at length above, the firm has failed to demonstrate that it is currently incurring a serious hardship as a result of the application of the FEA Regulations. In addition, the firm has failed to demonstrate that the maner in which Section 212.94(b) affects it is different from the manner in which that regulation is applied to all other refiner-buyers of crude oil under the Crude Oil Buy/Sell Program. The price of each barrel of crude oil sold by refiner-sellers under the Program may include a handling fee. This handling fee is

designed to permit recovery of certain expenses which refiner-sellers may incur in implementing the requirements of the Crude Oil Buy/Sell Program. Section 212.94(b) is also an essential element of the overall design of the Crude Oil Buy/Sell Program, which, in turn, is an integral part of the FEA's general regulatory program designed to allocate crude oil equitably to all refiners. The Crude Oil Buy/Sell Program was introduced by the FEA to provide small and independent refiners with an assured source of crude oil by requiring major integrated petroleum companies, *i.e.*, the firms with the greatest control over domestic production and the capacity for securing sufficient supplies of foreign crude oil, to sell crude oil to small and independent refiners such as Placid. Placid has surely been a major beneficiary of this Program. In fact, almost all of the crude oil which the firm currently processes at the Port Allen refinery is obtained through this Program. Unless a handling fee could be charged, refiner-sellers would be required to absorb all costs which they incur in implementing the requirements of the Program. Indeed, a number of firms which sell crude oil to Placid under the Program, in submitting comments on Placid's exception application, stated that their operations under the Crude Oil Buy/Sell Program would be significantly affected in an adverse manner if Placid were excused from its obligation to pay these firms a handling fee. Placid has submitted no evidence to dispute these claims. Nor has Placid demonstrated that the provisions of Section 212.94(b) adversely affect it in a manner which is in any way distinguishable from the manner in which that regulation is applied to all sales of crude oil under the Crude Oil Buy/Sell Program.

Based on the considerations set forth above and the information submitted by Placid in support of its exception

application, the Federal Energy Administration has concluded that Placid Oil Company has failed to establish that the application of the provisions of the FEA Regulations to it or to Placid Refining Company results in a serious hardship or gross inequity.

IT IS THEREFORE ORDERED THAT:

(1) The Application for Exception submitted by Placid Oil Company on December 5, 1975, be and hereby is denied.

(2) In accordance with the provisions of 10 CFR, Part 205, any aggrieved party may file an appeal from this Decision and Order with the Federal Energy Administration. The provisions of 10 CFR, Part 205, Subpart H, set forth the procedures and criteria which govern the filing and determination of any such appeal.

/s/
Melvin Goldstein
Director
Office of Exceptions and Appeals

Date: Apr. 9, 1976

FEDERAL ENERGY ADMINISTRATION
Washington, D.C. 20461

SEP 8 1976

Decision and Order*
of the Federal Energy Administration

Appeal

Name of Petitioner	:	Placid Oil Company
Date of Filing	:	May 7, 1976
Case Number	:	FEA-0825

On May 7, 1976, the Placid Oil Company (Placid) filed an Appeal from a Decision and Order which the Federal Energy Administration issued to it on April 9, 1976. *Placid Oil Company*, 3 FEA Par. 83,158 (April 9, 1976). The April 9 Order denied Placid's request for an exception which would permit the firm to retain 17,000 barrels per day (BPD) of crude oil which it is presently obligated to sell to other refiners pursuant to the requirements set forth in Section 211.63(a)[1]. The April Order also denied Placid's request for an exception from the requirement that it pay a handling charge of 30 cents per barrel for crude oil which the firm purchases from other refiners pursuant to the provisions of Section 211.65 (the Crude Oil Buy/Sell Program).[2]

[1] The provisions of 10 CFR 211.63(a) generally require that all supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on January 1, 1976, shall remain in effect for the duration of the Mandatory Petroleum Allocation Program. 41 Fed. Reg. 24388 (June 16, 1976). Prior to its amendment in February 1976, 41 Fed. Reg. 7836 (February 18, 1976), in accordance with the provisions of the Energy Policy and Conservation Act, Section 211.63(a) required that all supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on December 1, 1973, remain in effect for the duration of the Allocation Program. *See* 41 Fed. Reg. 2830 (January 20, 1976). For a full discussion of the legislative and regulatory history underlying Section 211.63(a), *see Condor Operating Co.*, 1 FEA Par. 20,148 (September 18, 1974); and *Condor Operating Co.*, 1 FEA Par. 20,661 (September 12, 1974).

* This document contains information which is arguably confidential under 18 U.S.C. 1905.

The present Appeal, if granted, would reverse the April 9, 1976 Decision and Order and grant Placid the exception relief which it originally requested. On June 23, 1976, Placid completed its submission of certain additional information which was essential for an analysis of the firm's Appeal. At the firm's request, a conference was held with the FEA on June 14, 1976, to discuss the firm's submission.

Placid is an independent producer of crude oil and natural gas. The firm produces more than 32,000 BPD domestic crude oil. On December 1, 1973, Placid was selling its entire production of crude oil to other firms under a variety of contractual agreements. Placid was also selling its crude oil production to these firms on January 1, 1976. As a result, Placid is obligated under the provisions of Section 211.63(a) to continue to sell the crude oil involved to those firms for the duration of the Mandatory Petroleum Allocation Program.

On December 30, 1974, Placid, through a wholly-owned subsidiary, Placid Refining Company (Placid Refining), acquired a refinery at Port Allen, Louisiana, from Ryder

[2] For a description of the Mandatory Crude Oil Buy/Sell Program, *see Champlin Petroleum Co.*, 2 FEA Par. 80,595 (May 22, 1975); *Getty Oil Co. (Eastern Operations), Inc.* and *Skelly Oil Co.*, 2 FEA Par. 83,148 (May 12, 1975); *Texaco, Inc. (Giant Industries, Inc.)*, 1 FEA Par. 20,184 (November 15, 1974); and *Union Oil Company of California*, 1 FEA Par. 20,628 (July 19, 1974).

System, Inc. (Ryder).[3] The Port Allen refinery has a certified capacity of 36,000 BPD of crude oil and is the only refinery operated by Placid. Placid is therefore a small and independent refiner as those terms are defined in 10 CFR 211.62. Placid Refining markets the gasoline, kerosene, diesel fuel, and fuel oil which it produces in the Port Allen refinery.

In considering Placid's exception application, the FEA determined that Placid had not provided any data which demonstrated that the firm as a whole was experiencing a serious financial hardship as a result of the application to it of the FEA Allocation Regulations. The financial data which the firm submitted also failed to demonstrate that the application of the FEA regulatory program would cause Placid or its subsidiary, Placid Refining, to encounter the type of severe financial difficulties which would require the firm to curtail any aspect of its operations, or would otherwise seriously impair any aspect of Placid or Placid Refining's business operations. In addition, the FEA determined that Placid had failed to demonstrate that the factual situation which it faced in operating a new refinery was similar in any significant manner to that faced by the Louisiana Land and Exploration Company (LL&E). *See Louisiana Land and Exploration* Co., 2 FEA Par. 83,339 (October 22, 1975) (*LL&E*).

In that case, the FEA determined that; (i) LL&E had planned and commenced the construction of its new refinery

[3] Prior to 1974, the Port Allen facility was owned by the Toro Petroleum Corporation (Toro) and consisted exclusively of a gasoline blending plant. In February 1974 Ryder acquired Toro and upgraded the Port Allen facility to permit refining operations. For a discussion of the history of the Port Allen facility, *see Placid Refining Co.*, 3 FEA Par. 80,526 (December 10, 1975); and *Ryder System, Inc.*, 1 FEA Par. 20,742 (December 16, 1974).

prior to the imposition of the FEA regulatory program; (ii) LL&E's decision to complete the construction of its refinery after the effective date of the FEA Allocation Program was reasonable in view of the substantial capital already committed to the project, the announced expiration date of the Program and the established federal policy of encouraging the construction of new and expanded domestic refining capacity; (iii) LL&E's refinery was designed to refine crude oil which it produced itself, and the utilization of other types of crude oil would reduce operating efficiencies and adversely affect the project's economic viability; (iv) LL&E had made a substantial showing that despite diligent efforts it had been unable to secure alternate crude oil supplies; and (v) in the absence of exception relief, LL&E's substantial financial investment in the refinery would be unproductive for the foreseeable future. Since these elements did not exist in the factual situation presented by Placid in its Application for Exception, the FEA concluded that the criteria applied in the *LL&E* case to establish the existence of a gross inequity had not been satisfied in Placid's case. Finally, Placid had not demonstrated that the requirement that it pay refiner-sellers a handling fee of 30 cents per barrel for the crude oil which it purchases under the terms of the Crude Oil Buy/Sell Program adversely affected the firm in a manner which is any way distinguishable from the manner in which that regulation affects all other refiner-buyers.

In its Appeal, Placid contends that the April 9 Decision is erroneous in several respects. Placid asserts that the FEA erred in considering the income which it received from its crude oil production operations in analyzing the impact of the FEA Regulatory Program on Placid. Placid asserts that since its exception request only involved its refinery opera-

tions, the FEA was required on the basis of the precedent established in *Delta Refining Co.*, 2 FEA Par. 83,275 (September 11, 1975), to limit its financial analysis to a consideration of the impact of the FEA regulatory program solely upon Placid's refinery operations.

However, the FEA thoroughly considered this claim in the April 9 Decision, and concluded that the criteria established in *Delta* were intended to apply solely to the analysis of the impact of the purchase requirements of 10 CFR 211.67 (the Old Oil Entitlements Program) upon small refiners which requested exception relief from that Program.

The April 9 Decision stated that:

> The Entitlements Program is designed to equitably distribute the benefits of low-priced, old domestic crude oil among all domestic refiners, and thereby reduce significant price disparities which would otherwise exist among refiners for the refined petroleum products which they market. Thus, the Entitlements Program is intended to affect only a firm's refining and marketing operations. The Program was not designed to affect other aspects of a firm's activities. Furthermore, the FEA recognized in *Delta* that the entitlements expenditure requirements of the Entitlements Program could have a greater adverse affect on small refiners as a class than on other firms due to their small size and limited cash flow resources. The FEA therefore determined that under this unique set of regulatory requirements special treatment for all small refiners was necessary in order to avoid significant disincentives to the continuation and expansion of a firm's production activities and to prevent distortions which might otherwise result in the presentation of the financial position of a firm's refining and marketing operations. The FEA held that, in considering small refiner requests for exception from the Entitlements Program, the production activities of a firm should be excluded. The *Delta* standard was not, however, intended to apply to exception requests submitted by firms from provisions of the FEA Regulations other than the Entitlements Program. *See Martin Oil Service, Inc.*, 3 FEA Par. 87,003 (December 5, 1975).

Since in its Appeal Placid merely restates the contentions which were previously considered and rejected by the FEA in the April 9 Decision, Placid has failed to refute the basis for the determination reached in the April 9 Decision. That Decision is therefore dispositive of this portion of Placid's Appeal.

The April 9 Decision also found that Placid had refused to provide the type of consolidated financial and operating data which was necessary to analyze the firm's claims of serious hardship and that Placid had therefore failed to establish that exception relief was warranted. In order to rectify this situation Placid has in its Appeal submitted current financial data pertaining to its consolidated operations.

This data is summarized in Table A below.

TABLE A

Placid Oil Company Operating Results

(FYE December 31)

	1975	1974
Revenues	$339,595,488	$138,734,300
Costs and Expenses	309,206,074	115,068,021
Pre-tax Profit	30,389,414	23,666,279
Profit margin role	8.95%	18.05%
Retained Earnings at end of year	$220,956,963	$206,952,854

As the data in Table A indicates, Placid's consolidated operations are currently in excellent financial condition. The firm's gross profits increased from approximately 23.7 million in 1974 to approximately $30.4 million in 1975, an increase of 28 percent over the course of a single year. The firm was able to increase its already substantial retained earnings by almost $14 million during the same period. Under these circumstances there is no basis for Placid's claims that it is experiencing a serious financial hardship as a result of the FEA Regulations.

In its Appeal Placid also reiterates its contention that the conditions under which it acquired the Port Allen refinery were similar to those which LL&E faced in constructing a completely new refinery. In the April 9 Decision the FEA rejected these contentions because it found that when Placid purchased the Port Allen refinery in December 1974, it did so with full knowledge of the requirements of the FEA regulatory programs with respect to its planned operation of the refinery and the firm's crude oil sales obligations under Section 211.63(a). Placid also failed to demonstrate that its continued refining of the crude oil currently available to it for purchase instead of the oil which it produces would significantly affect the operating efficiency of its refinery or make the operation of the refinery uneconomical.

In support of its Appeal Placid has presented certain additional factual material which was not submitted in connection with its exception application. Placid states that prior to 1974 it had developed general plans to vertically integrate its petroleum operations and had invested in land on which a refinery might be built. Placid further states that it had constructed new gathering lines in order to economize in the cost of transporting its crude oil pro-

duction to any refinery which it might build. On the basis of this material Placid claims that it had made a substantial investment in a refinery expansion program prior to the implementation of the FEA Regulatory Program and that the nature of this commitment is similar to that made by LL&E. Placid therefore claims that exception relief is warranted on the basis of the precedent established in the LL&E case.

The additional factual material which Placid has submitted does not satisfy any of the criteria upon which exception relief from the provisions of Section 211.63(a) was previously granted in LL&E or in any other similar case. The fact that Placid took certain steps prior to 1974 towards the construction of a new refinery is wholly unrelated to the firm's purchase of the Port Allen facility. The Port Allen refinery does not occupy the land in which Placid invested nor is the refinery specifically designed to refine the crude oil which Placid produces. *Quintana-Howell Joint Venture*, 2 FEA Par. 80,556 (March 17, 1975), *Saber Refining Co.*, 2 FEA Par. 20,736 (December 13, 1974). Furthermore, no showing has been made that Placid has been unable to locate alternate sources of supply of crude oil. The additional material which Placid has submitted on Appeal shows merely that the firm at one time may have planned to construct a refinery but abandoned those plans in favor of purchasing the Port Allen facility and did so with full knowledge of its rights and obligations under the applicable FEA regulations. Under these circumstances Placid has failed to refute the findings of the April 9, 1976 Decision and that Decision is therefore dispositive of this issue.

Finally, Placid reiterates its request that it be granted exception relief from the pricing requirements of FEA Man-

datory Crude Oil Buy/Sell Program.[4] However, Placid makes no additional substantive arguments in support of its position which were not considered in the April 9 Decision, and has therefore failed to demonstrate any error in the determination made in the April Decision to deny its request.

Based on the considerations set forth above and the information submitted by Placid in support of its Appeal, the Federal Energy Administration has concluded that the Placid Oil Company has failed to make a showing that the Order issued to it on April 9, 1976 was erroneous in fact or law or in any way arbitrary or capricious.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by the Placid Oil Company from a Decision and Order issued to it by the Federal Energy Administration on April 9, 1976, be and hereby is denied.

(2) This is a final order of the Federal Energy Administration of which an aggrieved party may seek judicial review.

/s/
John A. Hill
Deputy Administrator

Date: Sep 8 1976

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[4] Section 212.94 was amended in 41 F.R. 16448 (April 19, 1976) and now provides that: ". . . the price at which crude oil shall be sold . . . [pursuant to the Crude Oil Buy/Sell Program] shall not exceed the weighted average per barrel landed cost . . . of all imported crude oil (other than crude oil imported from Canada) delivered to a refiner-seller in the month in which the sale is made and the two months preceding that month, plus a *handling fee of five cents per barrel,* and any transportation, gravity and sulphur content adjustments . . . (Emphasis added).

FEDERAL ENERGY ADMINISTRATION
Washington, D. C. 20461

Oct 28 1976

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Frank P. Sapanaro, Jr., Esq.
Morgan, Lewis & Bockius
1800 M Street, N. W.
Washington, D. C. 20036

Re: Case Number FMR-0064

Dear Mr. Sapanaro:

On October 5, 1976, the Office of Exceptions and Appeals of the Federal Energy Administration received a submission filed by the Placid Oil Company (Placid) which was captioned a "Request for Reconsideration of the Appeal." In its October 5 submission, Placid requested that the FEA fully reconsider the arguments and evidence which the firm presented in its Appeal, and which formed the basis for a Decision and Order which was issued to the firm on September 8, 1976. *Placid Oil Co.*, 4 FEA Par. 80,534 (September 8, 1976).

Placid first sought exception relief from the provisions of 10 CFR 211.63 by filing an Application for Exception on December 5, 1975. On April 9, 1976, the FEA issued a Decision and Order to the firm which determined that Placid failed to demonstrate that it should receive exception relief which would permit it to retain approximately 17,000

barrels per day of crude oil for use in its own refinery which it is presently obligated to sell to other firms pursuant to the requirements set forth in Section 211.63. *See Placid Oil Co.*, 3 FEA Par. 83,158 (April 9, 1976).

On May 7, 1976, Placid filed an Appeal of the April 9 Decision and Order in which the firm alleged that the FEA erred in arriving at the previous determination. On September 8, 1976, the FEA issued a second Decision and Order to the firm which upheld the prior determination and accordingly denied the Placid Appeal. Placid submitted the present "Request for Reconsideration of the Appeal" on October 5, 1976.

In its Request for Reconsideration, Placid alleges that the FEA committed errors in the September 8 Decision and Order which are so significant that the Decision "is virtually certain to be reversed on judicial review." Placid specifically contends that the September 8 Decision should be reversed because the FEA failed to consider the Appeal in light of the precedent estiblished in *Louisiana Land and Exploration Co.*, 3 FEA Par. 80,586 (February 26, 1976). Placid states that if the criteria set forth in the *Louisiana Land* case had been applied to its request for exception or appeal, exception relief would have been granted from the provisions of Section 211.63. In addition to its claim that the FEA failed to follow the *Louisiana Land* precedent, Placid has challenged the validity of various other conclusions reached by the FEA in the September 8 Decision and Order.

After reviewing the material which Placid submitted in its original Application for Exception and the Appeal, we have determined that the present request fails to present any basis for the FEA to reevaluate its September 8, 1976 Decision and Order. Placid's assertion that exception relief

is warranted from the provisions of Section 211.63 under the February 26, 1976 *Louisiana Land* Decision is without merit. In that case, as well as in the other cases upon which Placid relies, one of the essential elements for exception relief is a persuasive showing by the petitioner that it incurred substantial financial obligations which were directly related to the expansion or construction of new refining facilities and that the obligations were incurred *prior* to the implementation of the FEA regulatory program on January 15, 1974. *See Louisiana Land and Exploration Co., supra; Louisian Land and Exploration Co.*, 2 FEA Par. 83,339 (October 22, 1975); *Saber Refining Co.*, 1 FEA Par. 20,736 (December 13, 1974; and *Famariss Refining and Oil Co.; Navajo Refining Co.*, 1 FEA Par. 20,629 (July 22, 1974). The importance of the timing of the firm's investment was again emphasized in a recent Decision issued in *Arizona Fuels Corp.*, 4 FEA Par. 83,061 (August 27, 1976).

In both the April 9 and the September 8 Decisions issued to Placid, the FEA made explicit reference to the fact that Placid's investment in the acquisition of an existing refinery was made on December 30, 1974, which is more than eleven months *after* the promulgation of the FEA Regulations from which it now seeks relief. As the FEA expressly stated in both prior Decisions, Placid was fully aware of the existence of Section 211.63 at the time it made the decision to purchase the refinery and thus was fully aware of the impact of the FEA regulatory program upon the refinery acquisition. In this regard, Placid's request for exception relief is clearly distinguishable form the cases above, including the February 26 *Louisana Land* Decision, in which the FEA has granted exception relief from the provisions of Section 211.63. In addition, as the September 8 Decision made clear, investments made by the firm prior

to 1974, including the pipeline development projects during the previous decade and the acquisition of land, were completely unrelated to the firm's purchase of the Port Allen facility and indeed can reasonably be assumed to have had independent investment value.

In addition to Placid's claim that the FEA failed to consider the February 26 *Louisian Land* Decision, the firm raised several additional arguments in support of its request that the FEA reconsider its September 8 Decision. For example, Placid contends that in the September 8 Decision the FEA failed to exercise its proper appellate role of performing an independent analysis of Placid's claims for relief. The firm also contends that the FEA applied the standard of serious financial hardship to it in a discriminatory manner and erred in determining the financial impact on Placid's refining operations of purchasing alternative sources of crude oil. Placid's claim of discrimination in the application of the serious hardship standards rests on a spurious comparison with the February 26 *Louisiana Land* Decision in which a separate basis for exception relief of serious hardship was not asserted. With regard to Placid's ability to secure additional volumes of crude oil for its refinery, the firm contends that the FEA failed to correctly apply both national energy policy considerations and equitible factors which Placid claims support its request for exception relief. The FEA has reviewed the materials which Placid submitted in its exception request and Appeal, and has concluded that contrary to Placid's assertions, the FEA considered all the evidence which the firm provided and correctly applied the criteria which govern the disposition of the Appeal.

The contentions which Placid has advanced in its request for reconsideration constitute allegations that the FEA erred

in fact or law, or otherwise acted in an arbitrary and capricious manner. As the September 8 Decision and Order stated, Placid is certainly entitled to challenge these conclusions on judicial review. The firm's present claims do not, however, provide any basis for the FEA to reexamine the evidence or conclusions which were previously made in connection with the Placid Appeal. Under these circumstances, we have concluded that no useful purpose would be served by a reconsideration of the September 8, 1976 Decision and Order which the FEA issued to Placid. Therefore, the Federal Energy Administration orders that the "Request for Reconsideration of the Appeal" which Placid Oil Company has filed with the Federal Energy Administration on October 5, 1976 be and hereby is dismissed.

Sincerely,

/s/
Melvin Goldstein
Director
Officer of Exceptions and Appeals

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PLACID OIL COMPANY
v.
THE FEDERAL ENERGY ADMINISTRATION AND
JOHN F. O'LEARY, ADMINISTRATOR

Civil Action No.
CA-3-77-1057-G

MEMORANDUM OPINION AND ORDER

This action for judicial review of a decision of the Federal Energy Administration (now the Department of Energy) reveals both the anomalous consequences that flow from pervasive federal regulation of a complex industry as well as the inherent difficulty of "substantial evidence" review of a somewhat intricate administrative proceeding.

The appeal by Placid Oil Co. is from the FEA's denial of its application for exemption from certain FEA regulations. Placid Oil is engaged primarily in oil and gas exploration, development, and production. On December 30, 1974, Placid Oil acquired through a wholly-owned subsidiary, Placid Refining Company, a small (36,000 bbls/day) refinery at Port Allen, Louisiana. Placid Refining thereafter undertook substantial capital improvements aimed at improving the efficiency of the operation of the refinery, with a view toward refining at Port Allen the type of crude produced by Placid Oil. Placid's goal of integrating its production and refining operations, however, has never been achieved due to the effect of FEA regulations from which Placid Oil seeks relief.

The principal FEA regulation which has frustrated Placid's effort to achieve a measure of integration is the so-called "December 1 Rule," part of the supplier/purchaser program set out at 10 C.F.R. § 211.63 (1978).[1] The December 1 Rule, promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 (EPAA), provides that all contracts for the sale of domestic crude oil which were in effect on December 1, 1973 must remain in effect for the duration of the FEA's regulatory program regardless of their original terms, unless terminated voluntarily by both parties to the contract. (The regulation now refers to contracts in effect on January 1, 1976). On December 31, 1973, Placid Oil was selling all of its crude production to other firms under various contracts, the terms and operation of which were effectively frozen by the December 1 rule. Likewise, all of Placid's production was under contract for sale to other firms on January 1, 1976. Consequently, Placid Oil may not sell the crude oil it produces to the Placid Refining Company.

Placid Oil also seeks exception relief from certain provisions of the FEA's buy/sell program, 10 C.F.R. § 211.65 (1978), also promulgated pursuant to the EPAA.[2] That

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[1] The December 1 Rule took effect on January 15, 1974.

[2] The EPAA, and, consequently the regulatory programs promulgated pursuant to it, were originally scheduled to expire in February, 1975. But in December, 1974, Congress extended the statute's operation until August 31, 1975 and it was later extended to September 30, 1981.

program, though it has been substantially modified in recent years, essentially requires certain specified large refiners with ample supplies of crude oil to sell a portion of those supplies to small refiners. The regulations include a formula for determination of the price at which such sales must be made and, until March, 1976, permitted sellers to charge a handling fee of \$.30 per barrel. That handling charge was reduced in March, 1976, along with substantial changes in the pricing formula. Placid Refining obtained its supply of crude through the buy/sell program until February, 1978, when it became cheaper to obtain crude in the open market due to changes in the regulatory pricing formula.

As a consequence of FEA regulatory programs, then, Placid Oil was not permitted to sell its crude oil production to its refining subsidiary, but rather was required to sell it to other firms at a regulated price well below the world market price (most of Placid Oil's production was "old oil" as defined by FEA regulations and hence had to be sold at the lower tier controlled price prescribed for old oil). At the same time, Placid Refinery was forced to obtain its supply of crude oil under the buy/sell program, paying for several years the seller's average cost of crude oil plus a \$.30 per barrel handling charge, and later paying the seller's average cost of imported crude plus a \$.05 per barrel handling charge.[3] In fact, some of the firms to which Placid Oil was selling crude were the same firms from which Placid Refining was purchasing crude at a higher price that included a handling charge. Largely as a result of the impact of the

[3] The extent to which the adverse impact of the regulations upon Placid Refining has been mitigated by the small refinery bias of the Crude Oil Entitlements Program, 10 C.F.R. § 211.67 (1978) is not disclosed by the record.

regulatory programs, Placid Refining sustained either a loss or a slight profit in its first year of operation.[4]

On December 5, 1975, Placid Oil filed with the FEA an application pursuant to 10 C.F.R. §§ 205.50-205.58 for exceptions to the December 1 Rule with respect to its short-term crude oil sales contracts and to the \$.30 handling charge provision of the buy/sell program with respect to the crude oil purchased by the refinery under that program. The portion of the FEA requlation governing exceptions particularly relevant here is 10 C.F.R. § 205.55(b), which provides in part:

> (2) An application for an exception may be granted to alleviate or prevent serious hardship or gross inequity . . .
>
> (3) An application for an exception shall be decided in a manner that is, to the extent possible, consistent with the disposition of previous applications for exception.

Following Placid's application for exception relief, the FEA notified those firms that would be affected by the granting of an exception to Placid — the firms receiving crude oil from Placid — of the filing of the application. Nearly all of these firms objected to the granting of an exception and contended that they would be adversely affected by such action. One firm, Shell Oil Company, indicated that it had no objection to the granting of the relief requested by Placid so long as its own obligations under the buy/sell program were reduced by the amount it was receiving from

[4] At the time of Placid's application for relief, the projected loss for the first year of refinery operation (1975) was approximately \$2,700,000, including depreciation expense. This figure was later revised to show a small profit. Placid's 1976 net profit for refinery operations was \$2,633,276, which Placid claims reflects a mere 1.9% return on investment.

Placid, in accordance with the FEA decision in *Continental Oil Co.*, 2 FEA ¶ 80503 (January 7, 1975).

The FEA's Office of Exceptions and Appeals issued a decision on April 9, 1976 denying Placid Oil's application for exception. Placid's appeal from this decision pursuant to 10 C.F.R. § 205.100 *et seq.* was denied by the FEA on September 8, 1976. Finally, after its request for a reconsideration of the appeal was denied, Placid Oil commenced this suit on August 3, 1977 for review of the FEA's action.

Placid Oil argues here that the FEA's decision denying an exception was arbitrary, discriminatory, and an abuse of discretion because the decision is contrary to the FEA's decision in *Louisiana Land and Exploration Company*, 2 FEA ¶ 83,339 (October 22, 1975), *modified*, 3 FEA ¶ 80,586 (February 26, 1976) (*LL&E*). Placid contends further that the FEA decision was not supported by substantial evidence, and that the FEA failed to properly distinguish the *LL&E* decision and failed to properly consider evidence introduced in the administrative proceeding. Placid has moved for partial summary judgment with respect to these contentions, and FEA has filed a cross-motion for summary judgment.

Placid argues in the alternative that if the FEA's decision was correct under existing regulations, then the December 1 Rule is unconstitutional under the Fifth Amendment, both on its face and as applied to Placid, in that it works a deprivation of property without just compensation. Finally, Placid argues that, if the FEA decision is correct under the regulation involved, those regulations are in excess of the agency's authority. The FEA has filed its own motion for summary judgment with respect to the later two arguments, and Placid has opposed that motion. Placid seeks both injunctive and monetary relief.

Analysis

1. *The Standard of Review.*

Judicial review of FEA decisions is provided by section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a) (1976) which in turn refers to the judicial review provisions of the Economic Stabilization Act, 12 U.S.C. § 1904, note § 211. That section provides in part as follows:

> . . . no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code . . . and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

The standard for review of FEA decisions under this provision have been defined largely by the Temporary Emergency Court of Appeals, which has exclusive jurisdiction of appeals from district courts involving regulations and orders issued the [sic] pursuant to the EPAA. While the search for a durable standard for review of complex administrative decisions has often been an exercise in linguistic game-playing sometimes involving nonsensical semantic distinctions, the TECA appears to have applied a narrow standard with consistency. In *Basin, Inc.* v. *FEA*, 552 F.2d 931 (Em. App. 1977), the court in reviewing a challenge to the validity of the December 1 Rule held that "the regulation should have been upheld if it had any rational basis to support it," though it went on to note that "reviewing courts should not simply 'rubber-stamp' the actions of administrative

agencies." 552 F.2d at 934. In *Powering Oil Co.* v. *FEA*, 536 F.2d 378 (Em. App. 1976), involving like this case an appeal from denial of exception relief, the court reiterated the "rational basis" test, and wrote as follows with respect to applications for exceptions:

> The necessity of making "rough accommodations" to implement and effectively administer the "complex program necessary to deal with the petroleum industry" has warranted "special attention" by this court to the rule of deference when it is faced with reviewing agency action which grants or denies exception relief to parties based on a case-by-case determination of the effect of the application of agency regulations to that party (citations omitted). 536 F.2d at 385-86.

This same standard has been applied in other TECA decisions. In *Pasco, Inc.* v. *FEA*, 525 F.2d 1391 (Em. App. 1975), for instance, the court wrote that

> [a]dministrative decisions based upon analysis of the data and information submitted on applications for exception relief require the application of administrative expertise, and this court should not be quick to overturn them .... 525 F.2d at 1404.

See also Mapco, Inc. v. *Carter*, 573 F.2d 1268 (Em. App. 1977), *cert. denied*, 98 S.Ct. 3090 (1978); *Cities Service Co.* v. *FEA*, 529 F.2d 1016 (Em. App. 1975).

Despite the narrow standard, the Emergency Court of Appeals has on occasion found an FEA decision to be "arbitrary, capricious, discriminatory" and "not supported by substantial evidence," *Husky Oil Co.* v. *DOE*, No. 77-190 (Em. App. August 10, 1978), particularly where the agency has failed to follow its own rules and decisions. Moreover, it is settled that an agency may not apply its rules in a discriminatory manner. *Marco Sales Agency* v. *FTC*, 453

F.2d 1 (2d Cir. 1971). Finally, review of the FEA decision here is limited to those grounds considered by the agency in support of its decision. *Tabor* v. *Joint Board for the Enrollment of Actuaries*, 566 F.2d 705 (D.C. Cir. 1977).

2. *The FEA Decision.*

In its application for exception before the FEA, Placid sought to terminate approximately 20 contracts that had been "frozen" under the December 1 Rule so that it could use the crude oil subject to those contracts in its own refinery. Placid also sought relief from the handling fee charged it by sellers under the buy/sell program. In support of its application, Placid argued that its refinery was "the only refinery in the United States that has been totally dependent upon the allocation program for its crude oil supplies until June 1975" (AR 31); that it had anticipated use of its own crude oil in the refinery either upon voluntary termination of its production supply contracts or upon expiration of FEA regulations; that because of FEA regulations, its crude oil costs were higher than the national average; that the market served by Placid Refinery was one in which prices were significantly lower than average; that the FEA regulations had caused the refinery to operate at a loss during the first nine months of operation; and that the granting of the requested relief would permit Placid Refinery to operate at a moderate rate of return. In addition, Placid argued that the EPAA itself supported the granting of the requested relief, in that one of the nine stated objectives of the Act is to preserve an

> economically sound and competitive petroleum industry including the priority needs to restore and foster competition in the producing and refining . . . sectors of the petroleum industry, including independent refiners, small refiners . . . . 15 U.S.C. § 753(b) (1976).

Placid argued further that prior FEA decisions, especially the decision in *Louisiana Land and Exploration, supra* (*LL&E*) mandated acceptance of the application for exception. Finally, Placid argued that the grant of the relief requested would not significantly harm those firms to whom it was then selling its crude oil.

In denying the application, the Office of Exceptions and Appeals found that Placid Refinery's economic viability was not threatened, that financial data with respect to the company's full range of operations was relevant to disposition of the application,[5] and that the *LL&E* case was distinguishable from this case in seven important respects. In its decision in the administrative appeal, the FEA essentially reiterated the reasoning of its earlier decision.

Analysis of Placid's attack upon the FEA decision is best made in two steps. First, the FEA decision will be viewed only in the context of the statutes and regulations involved. Second, the effect of prior FEA decisions will be analyzed.

The first step presents little difficulty. Viewed in isolation from earlier FEA decisions, the decision here is based on substantial evidence, and is neither arbitrary nor discriminatory. Congress' mandate to the FEA as reflected in the language of the EPAA is a complex and inherently flexible one, and the agency must be given broad latitude in carrying it out. While Placid points to the fact that one of the express purposes of the act is to promote competition in all sectors of the petroleum industry and to preserve the economic

[5] Placid refused to submit financial data concerning the company's production activities, so that the FEA's initial review was limited to financial data concerning refining operations despite the Agency's ruling that the company's full financial data were relevant to proper disposition of the application. At the administrative appeal, however, Placid did submit its consolidated financial data.

viability of small refineries, that is only one of nine objectives set forth at 15 U.S.C. § 753 which are to be achieved "to the maximum extent practicable." The very nature of the legislation contemplates substantial administrative flexibility. *See Consumers Union* v. *Sawhill*, 525 F.2d 1068 (Em. App. 1975). In light of the agency's finding that Placid Refinery was economically sound and was not threatened with irreparable harm, its failure to find either gross inequity or serious hardship and its consequent denial of relief cannot be called either arbitrary or discriminatory, considered without regard to prior FEA decisions.

The gist of Placid's complaint, however, is that the decision was arbitrary and discriminatory because the FEA departed unjustifiably from its own prior decisions. The Emergency Court of Appeals has held that it is "of paramount importance that the (FEA) adhere to its own announced rules." *Delta Refining Co.* v. *FEA*, 559 F.2d 1190, 1199 (Em. App. 1977). In support of its decision here, the FEA attempted to distinguish several of its prior decisions. The question that this court must resolve is whether the distinctions made by the FEA are rational, principled distinctions, or whether they are distinctions without a difference.

Placid's first argument is that the FEA arbitrarily departed from its decision in *Delta Refining Co.*, 2 FEA ¶ 83,275 (September 11, 1975) in considering Placid's consolidated financial data rather than focusing exclusively upon data concerning refining and marketing operations. *Delta* involved

an application for exception relief from the Entitlements Program, 10 C.F.R. § 211.67 (1978).[6] In setting guidelines for granting exception relief from the program, the FEA held that only a firm's refining and marketing operations should be considered in such cases, because inclusion of production data would "distort the financial portion of the refining and marketing operations and serve as a disincentive to the expansion of production activities" in contravention of the express policy of the EPAA. 2 FEA at 83,882. In a recent appeal from a denial of full exception relief from the entitlements program, the Emergency Court of Appeals found that the agency had ered in considering consolidated financial data:

> The agency's inclusion of such information in the case of Husky, a producer-small refiner, was contrary to its stated policy of avoiding disincentives to the expansion of production activities. [citing *Delta*]. *Husky Oil Co.* v. *DOE*, 582 F.2d 644,651 (Em. App. 1978).

In the decision under review here, the FEA held that Placid's consolidated financial status was relevant in deciding the application for exceptions and distinquished *Delta* on the ground that the "refining and marketing operations only" rule announced there applied only to applications for exception from the entitlements program. The entitlements program, FEA argues, applies exclusively to refiners, whereas the December 1 Rule from which relief is sought here involves production operations. While the factual basis of the

[6] The entitlements program is designed to alleviate crude oil cost differentials between refineries with varying degrees of access to lower-priced domestic crude oil. Under the program, refineries must in effect purchase the right to process a proportionate amount of low-cost crude greater than the national average from refineries that process a percentage of imported crude greater than the national average.

distinction is certainly true, the question here is whether the distinction is a meaningful one.

First, it is significant that the rationable for the rule announced in *Delta* is applicable to cases involving the December 1 Rule. The holding in *Delta* that only refining and marketing operations should be considered in deciding application by the relatively few small refiners that were also producers was rooted in a policy of encouraging expansion of production activities and in a concern for the potentially severe impact of the entitlements program upon small refiners with substantial access to domestic crude who would have to expend large sums to purchase entitlements and who might be unable to pass those costs on to product customers. The chief concern of the FEA was that if consolidated financial data were considered in determining applications for relief from the entitlements program, a small refiner-producer might be concerned that expansion of production activities and consequent increase in overall firm profits might lead to denial of an application for exception to entitlements requirements and might therefore impair the financial performance of refining operations. That same possibility exists here. If a small producer-refiner knew that the FEA would consider consolidated financial data in deciding whether to grant an exception to the December 1 Rule, that knowledge might create a disincentive to expansion of production facilities. Thus the FEA's distinction cannot be supported on the ground that the rationale of the Delta rule does not apply to applications for exception to the December 1 Rule.

It is important to remember, however, that the policy of encouraging expansion of production activities is just one of several objectives that the FEA is charged to pursue "to the maximum extent practicable." The FEA decided here that

while that particular objective mandated exclusion of consolidated financial data where applications for exception to the entitlements program were involved, it did not mandate a similar rule with regard to relief from the December 1 Rule and the buy/sell program. In view of the complexity of its administrative rask [sic], the FEA must be given considerable flexibility in its pursuit of the goals of the EPAA. *Basin, Inc.* v. *FEA*, *supra*. It was not irrational for it to conclude that, while the objectives of the Act require consideration of only refining and marketing activities where the entitlements program is concerned, they did not mandate a similar rule where the December 1 Rule and buy/sell are involved.[7]

The aim of the entitlements program is to alleviate crude oil cost differences among refiners with varying degrees of access to low-cost domestic crude. The program applies only to refiners, and, as the FEA recognized in *Delta*, it is capable of working severe hardship upon small refiners who process primarily domestic crude oil.

The December 1 Rule, on the other hand, is aimed principally at achieving an equitable allocation of crude oil supplies. Given this variance of purpose between the December 1 Rule and the Entitlements Program, the factors governing applications for exceptions to the regulations can be expected to be different.

Moreover, Placid is here seeking relief from regulations that effect the relationship between its production and refining operations. That is, Placid seeks relief from a regulation imposed upon its production activities because of the

[7] One of the objectives of the EPAA involved here but *not* directly involved in cases involving the Entitlements Program is the goal of "the allocation of . . . crude oil to refineries in the United States to permit such refineries to operate at full capacity." 15 U.S.C. § 753(b)(1)(E) (1976).

resultant effect upon its refining activities. In *Delta* and *Husky*, on the other hand, relief was sought from a program that affected only refining activities, on the grounds of their adverse effect upon those refining activities. The injury suffered in those cases was a direct result of the regulatory program from which relief was sought, while the injury suffered here results from the regulatory program *and* the fact that Placid is both a producer and a refiner of oil. Thus while it was possible in Husky and *Delta* to consider the applicant's refining activities in isolation, that is not possble here because it is Placid Oil, an oil producer, that seeks relief from FEA regulation. In light of the significant differences between the regulatory programs involved and the facts of the cases, the FEA's application of a rule different from that applied in *Delta* was neither irrational nor arbitrary nor discriminatory.[8]

In further support of its argument that the FEA arbitrarily departed from its own rules and decisions, Placid argues that the FEA's decision in *Louisiana Land and Exploration*, *supra*, should have dictated a contrary decision by the agency here. This is a much more substantial argument than the allegedly unsupportable departure from *Delta*. In fact, the validity of the FEA's distinction of *LL&E* is the

[8] The decision of the Emergency Court of Appeals in *Husky* does not, as Placid argues, require a different result. The court there found that the agency acted arbitrarily in not following its own rule concerning use of financial data in deciding applications for exceptions to the entitlements program, but it did not hold that that rule applied in cases involving regulations other than the Entitlement Program regulations.

Moreover, the fact that all applications for exceptions are governed by the same regulation does not, as Placid contends, require that the same factors be applied in each case. The criteria prescribed by the regulation — "gross inequity" and "severe hardship" — are inherently flexible terms that cannot be measured in precisely the same manner in all contexts.

analytical key to the resolution of this case. Before considering that decision, however, it is useful to examine the grounds upon which FEA has in the past granted exceptions to the December 1 Rule.

Applications for exceptions have been granted where a firm has invested substantially in new refining capacity in reasonable reliance upon the availability of a supply of crude oil but has later found the anticipated supply unavailable due to the operation of the December 1 Rule and has been unable to obtain supplies elsewhere. In such cases the FEA has found gross inequity and has granted relief. Other factors have been considered, such as the national policy of preserving the economic life of independent refiners, but the analytical focus has been reliance and financial harm due usually to the inability to obtain an adequate supply of crude oil. In *Famariss Oil and Refining Co./Navajo Refining Co.*, 1 FEA ¶ 20,629 (July 22, 1974), for instance, exception relief was granted to firms that had constructed new and expanded refinery facilities before the promulgation of FEA regulations in reliance upon a crude oil supply agreement with the State of New Mexico. The agency found that the loss of the anticipated supply would have jeopardized the operation of the new refineries in a manner contrary to the national policy of encouraging the expansion of domestic refining capacity, and granted exceptions to the December 1 Rule. The same result was reached under similar circumstances in *Saber Refining Co.*, 1 FEA ¶ 20,736 (December 13, 1974).

In *LL&E*, the FEA, while it found that neither *Saber* nor *Famariss* was directly applicable, granted exception relief to an applicant similar in many respects to Placid. LL&E was a producer of oil that decided to enter the refining sector of the industry. In early 1973 the firm initiated plans

for construction of a 30,000 barrel per day refinery. The refinery was designed specifically to refine the type of oil — Jay crude — that LL&E produced. Construction of the refinery was begun in October, 1974 and completed the following September. Because of the December 1 Rule, however, LL&E was required to sell its Jay crude to Exxon, and was not permitted to use it in its own refinery.

In considering LL&E's application for exception from the December 1 Rule, the FEA (in its final decision issued February 26, 1976) found that LL&E had not demonstrated the type of reasonable reliance shown by the applicants in *Famariss* and *Saber*, because of the timing of its expenditures in relation to the promulgation of the December 1 Rule. Nonetheless, the agency found that a gross inequity existed and granted relief to the extent required to afford LL&E a supply of Jay crude equal to the national average supply-to-capacity ratio. Relief was granted on several grounds:

1. LL&E was producing Jay crude before promulgation of the December 1 Rule.

2. LL&E was continuing its production efforts and would use its Jay crude production in its own refinery but for the operation of the December 1 Rule.

3. Before promulgation of the rule, LL&E "planned and took initial steps to build a refinery, on the basis of its ownership of the Jay crude oil field."

4. The refinery was designed to operate efficiently only with Jay crude as feedstock.

5. LL&E "committed significant financial resources to the construction of the refinery prior to the promulgation of the December 1 Rule."

6. "LL&E continued construction of its refinery without interruption from 1973 until the facility was completed in late 1975."

7. The construction of the refinery advanced the national policies of expanding domestic refinery capacity and fostering competition in the refining sector of the industry.

The FEA also noted that any adverse impact upon LL&E's crude oil customer, Exxon, could be remedied by means of a partial exemption from requirements of the buy/sell program granted to Exxon under the rule of *Continental Oil Co.*, 2 FEA ¶ 80,503 (January 7, 1975), and should not preclude the grant of relief to LL&E. Finally, there is no indication that the agency considered financial data other than that relating to LL&E's refining operations.

In its decision denying exception relief to Placid, the FEA distinguished *LL&E* on several grounds. First, the agency found that Placid had not made financial commitments toward a new refinery before the promulgation of the FEA regulations to the same extent as LL&E had. Specifically, the agency noted that Placid did not purchase its refinery until December 30, 1974, nearly a year after promulgation of the regulations. The agency rejected Placid's contention that it had expended millions of dollars in anticipation of commencing refining operations:

> [T]he firm at one time may have planned to construct a refinery but abandoned those plans in favor of purchasing the Port Allen refinery facility and did so with full knowledge of its rights and obligations under the applicable FEA regulations.

The FEA further distinguished *LL&E* on the grounds that Placid's refinery was "not specifically designed to refine the crude oil which Placid produces;" that "no showing has been made that Placid has been unable to locate alternate sources of supply of crude oil;" that Placid submitted no evidence that use of the type of crude oil currently available to it "will significantly reduce its operating efficiency;" or that "additional expenditures are required in order to process this available crude" (adopted from opinion issued December 5, 1975); and, finally, that "Placid has submitted no convincing evidence that the continuation of its processing of the crude oil currently available to it will adversely affect the refinery's economic viability" (adopted from opinion issued December 5, 1975). Placid challenges each of these grounds as either arbitrary or not supported by substantial evidence.

The task of determining upon the basis of a lengthy, opaque administrative record whether the various findings of the agency are supported by substantial evidence is at best a treacherous one. This court's assessment of the record and of the FEA's decision is that, while there are several inconsistencies between the FEA's decision here and the *LL&E* decision, the agency's distinction of the *LL&E* case can be supported on two of the grounds advanced, and that, further, these grounds of distinction are of sufficient substance that the FEA's decision cannot be called arbitrary or discriminatory, is supported by substantial evidence, and should therefore be affirmed.

First, it is significant that Placid purchased a refinery nearly a year after the effective date of the December 1 Rule, whereas LL&E constructed a refinery for which it had made significant financial commitments before the regulations were promulgated. While Placid strenuously objects to this distinction on the grounds that it spent millions of dollars in anticipation of constructing a refinery at another site, those expenditures were not directly related

to the refinery eventually purchased. Thus the actual purchase of the refinery by Placid was, in a sense, an independent business action taken with knowledge of the existence of the FEA regulations. While that distinction is not a wholly satisfying one, and seems slightly unfair, it cannot be called either arbitrary or discriminatory. The FEA is charged with a difficult regulatory task, and it must be permitted to make technical distinctions so long as those distinctions are not arbitrary, particularly where it is applying such diaphanous criteria as "severe hardship" and "gross inequity." While there may not be a significant qualitative difference between Placid's reliance on the availability of its own crude oil production and LL&E's reliance, there is at least a difference of degree sufficiently substantial that the FEA's distinction of the cases on this ground cannot be called arbitrary.

The other, perhaps more meaningful ground of distinction advanced by the agency rests on the different degrees of specificity in the designs of the refineries. LL&E's refinery was designed specifically for the Jay crude produced by the firm, and the refinery could operate on other types of crude only after expensive alterations and at significantly reduced efficiency. Moreover, there was evidence that LL&E was unable to obtain Jay crude in the open market or through the buy/sell program. Placid's refinery, however, while designed to refine the type of crude produced by Placid, is capable of refining other types of crude without additional expenditures and without substantial loss of efficiency. Moreover, it appears from the record that Placid, unlike LL&E, *was* able to obtain the type of crude for which its refinery was designed through the buy/sell program. Thus the hardship that would have been suffered by LL&E by virtue of denial of its application was greater than that

suffered by Placid. Again, that is not a distinction of resounding significance, but neither is it arbitrary or irrational.

There are several significant unexplained inconsistencies between the agency's reasoning in the two cases. First, the agency in its *Placid* decision departed from its conclusion in LL&E that adverse impact upon the applicant's crude oil customers was not a factor to be considered in deciding an application for exception from the December 1 Rule. This, however, was not a factor to which the agency ascribed great importance, and the discrepancy is not so significant as to render the agency's decision either arbitrary, irrational, or unsupported by substantial evidence.

A far more difficult problem is presented by the agency's consideration here of Placid's consolidated financial data. While, as discussed above, this course was not prohibited by *Delta Refining Co., supra,* as *Delta* involved only the Entitlements Program, the FEA does not explain here why it considered Placid's consolidated financial data while it had apparently considered only refinery financial data in *LL&E*. The question that must be resolved is whether that inconsistency renders the FEA's decision here arbitrary and unsupportable. That question can be resolved into three separate but logically interdependent inquiries. First, it must be determined to what extent, if at all, the *LL&E* decision can be viewed as establishing a rule that in applications for exception from the December 1 Rule only financial data relating to refining operations may be considered. Second, if such a rule was established, it must be determined whether the agency violated it in the decision under review here. Finally, if a rule was established in *LL&E* and the agency deviated from it here, this court must determine whether that deviation was so demonstrably non-determinative of

the agency's decision as to escape the usual rule that an administrative agency must consistently apply its own rules.

The first inquiry is whether the FEA in *LL&E* established a rule that in deciding applications for exception from the December 1 Rule only financial data relating to refining operations may be considered. It should be noted at the outset that such a rule would not be wholly logical, in view of the fact that the December 1 Rule applies as directly to production operations as it does to refining operations; its effect is upon contractual relations between producers and refiners. In fact, there might conceivably be a case where a producer applied for exception relief from the December 1 Rule solely because of its effect upon its production operations. In such a case it would be irrational to consider only financial data that related to refining operations.

In the *LL&E* decision the FEA did not explicitly hold that only refinery operation financial data should be considered in determining applications for exception from the December 1 Rule. In fact, the question of the range of financial data to be considered was not discussed at all.

It is true, on the other hand, that the *LL&E* decision indicates that the FEA considered only refinery financial data, and not consolidated data in reaching its decision. The question of whether this feature of the *LL&E* decision establishes a rule that must be followed in later decisions turns essentially on the extent of the freedom of action that an administrative agency should be allowed. On the one hand, given the magnitude and importance of decisions entrusted to such agencies, it is desirable to impose a strict standard of consistency upon agency decisions. On the other hand, to view every aspect of every agency decision as the establishment of a rule binding upon the agency in its future

decisions would be to severely restrict the agency's range of action and undermine its effectiveness.

It cannot be said that the FEA in *LL&E*, simply because it did not consider consolidated financial data, established a rule that consolidated data were never to be considered in determining applications for exception relief from the December 1 Rule. The agency in that case was confronted with a case where a refiner-producer had invested substantial sums in a refinery designed specifically to process company-produced crude oil. The agency found that the application of the December 1 Rule to LL&E worked a gross inequity upon the company, and it apparently concluded that that determination could be reached without resort to a study of the company's consolidated financial data. Here the agency apparently saw what it considered to be a closer case concerning exception relief, and it determined that consolidated financial data should be considered in reaching a final decision. To be sure, the agency should have given reasons for its consideration of consolidated data and for its failure to consider such data in *LL&E*. But the decision cannot be considered as either arbitrary or irrational.

Furthermore, even if a rule was established by the *LL&E* decision, the agency's departure from it here appears not to have been a dispositive factor in its decision. The agency's office of Exceptions and Appeals in its April 9, 1976 decision determined that Placid was not entitled to relief, though it had before it financial data relating only to refining operations. And while the agency in its final decision did consider consolidated data, its decision was largely an affirmance of the decision of the Office of Exceptions and Appeals.

Thus while the agency may have altered its approach somewhat in the decision under review here with regard to the range of financial data considered, the change in approach was not the type of arbitrary departure from an established rule that would mandate reversal of the agency's decision, particularly where, as here, there are other substantial grounds for distinguishing the prior agency decision.

Thus while the *LL&E* case was similar in many respects to the situation presented here, there are distinctions between the cases, relied upon by the FEA, which support the FEA's denial of relief here and which render that decision neither arbitrary nor irrational nor unsupported by substantial evidence. In view of that fact, and in view of the fact that Placid's other arguments have been rejected, Placid's motion for partial summary judgment is denied, and FEA's cross-motion for summary judgment on these issues is granted.[9]

3. *The Constitutional Claim.*

The FEA has moved for summary judgment on Placid's claim that the December 1 Rule works a taking of private property without just compensation in violation of the Fifth Amendment to the United States Constitution. If this court finds that a substantial constitutional claim exists, it is re-

[9] The foregoing analysis has dealt primarily with the denial of exceptions to the December 1 Rule. Placid also challenges the FEA's denial of relief from the handling charge provision of the buy/sell program. That denial of relief, too, must be upheld as Placid has made no substantial claim that the imposition of the handling charge worked either severe hardship or gross inequity upon. Moreover, at least as to prospective relief, the claim may be moot in view of the reduction of the handling charge from 30 cents to 5 cents.

quired by Section 5(a) of the EPAA[10] to certify that question to the Emergency Court of Appeals.

The FEA argues that no substantial constitutional issue is raised here because the validity of the December 1 Rule has already been upheld by the Emergency Court of Appeals against similar challenges. Placid would distinguish these prior decisions on the ground that they upheld the rule's validity as an *emergency* measure only, and Placid seeks to offer proof that the emergency at which the rule was directed — that is, a shortage of crude oil — no longer exists.

In the first case upholding the constitutionality of the rule, *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351 (Em. App. 1975), the Emergency Court of Appeals specifically withheld decision on whether the regulation would be valid "as a long continuing response to chronic energy problems." *Id.* at 362. Placid argues that that question is now ripe for decision in light of the alleged cessation of emergency conditions in the industry and in light of what Placid alleges to be a transformation of the regulatory program from temporary to permanent as a result of the passage in 1977 of the Department of Energy Organization Act, 42 U.S.C. § 7251.

The first problem with Placid's argument is that the challenged rule is not "permanent"; in fact it is scheduled to

[10] Section 5(a) of the EPAA, 15 U.S.C. § 754(a) (1976), incorporates Section 211 of the Economic Stabilization Act, which provides in part as follows:

> (c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals....
>
> (g) The Temporary Emergency Court of Appeals, and the Supreme Court in review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title.

expire in 1981. Moreover, the policies announced by the EPAA are still in effect and, presumably, remain the policies of Congress. The wisdom or validity of those policies are, of course, beyond this court's legitimate concern. A more significant problem with Placid's argument is that the Emergency Court of Appeals has recently reaffirmed the constitutionality of the December 1 Rule without the limiting language of *Condor.*[11] *Basin, Inc.* v. *FEA*, 552 F.2d 931 (Em. App. 1977). Thus, while the constitutional claim is by no means a frivolous one, and while, as the court held in *Griffin* v. *United States*, 537 F.2d 1130, 1137 (Em. App. 1976) "should any state of facts fairly to be contemplated within the scope of the complaints indicate that there might have been an unconstitutional taking of plaintiffs' property the question would have to be tried," nonetheless in light of the recent decisions, Placid has not raised here a substantial constitutional question with regard to the validity of the December 1 Rule. Consequently the issue will not be certified to the Emergency Court of Appeals. FEA's motion for summary judgment on this issue is granted. *See also Atlantic Richfield Co.* v. *FEA*, 429 F.Supp. 1052 (N.D. Cal. 1978), *aff'd*, 556 F.2d 542 (Em. App. 1977).

4. *The Statutory Validity of the December 1 Rule.*

Placid's final contention is that the December 1 Rule and the handling charge provisions of the buy/sell program are beyond the authority of the agency because they contravene the express objective of the EPAA to "foster competition

[11] Placid also cites the following language from *Condor* as supportive of its right to introduce evidence on the constitutional claim:

> A reasoned decision for the temporary suspension of usual ownership prerogative based upon broad national needs does not constitute necessarily an unconstitutional taking; and the issue of whether it does properly turns upon the circumstances of each case. 514 F.2d at 361.

in the . . . refining . . . sectors . . . and to preserve the competitive viability of independent refineries [and] small refiners." 15 U.S.C. § 753 (1976). The agency has moved for summary judgment on this point.

It has been repeatedly held that the nine objectives of the EPAA set forth at 15 U.S.C. § 753 are not mandatory rules but rather goals to be achieved "to the maximum extent practicable," and that the FEA must be allowed broad flexibility in fashioning a regulatory scheme to achieve those goals. *See, e.g., Pasco, Inc. v. FEA*, 525 F.2d 1391 (Em. App. 1975). On these grounds the December 1 Rule has been upheld against attacks virtually identical to that made here. *See Condor Operating Co.* v. *Sawhill, supra; Basin, Inc.* v. *FEA, supra.* Placid, however, claims that the agency should again be required to demonstrate the validity of the rule in the light of changed circumstances in the industry.

The validity of the December 1 Rule was last upheld in March, 1977. Placid's only argument at this stage is that "given the changing market conditions, it is certainly open to question whether the FEA's policies are consistent with the statutory mandates of the EPAA." Placid also offers several DOE statements to the effect that an emergency situation no longer exists with respect to crude oil supply.

It is a matter of judgment whether Placid should be able to try this claim. In view of the extremely narrow standard of review, Placid's chances of success on the claim are negligible. On that ground the FEA's motion for summary judgment on this issue is granted.

/s/

Patrick E. Higginbotham
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

PLACID OIL COMPANY

v.

THE FEDERAL ENERGY ADMINISTRATION AND
JOHN F. O'LEARY, ADMINISTRATOR

CIVIL ACTION NO.
CA-3-77-1057-G

JUDGEMENT

In accordance with this court's Memorandum Opinion and Order filed February 26, 1979 granting the defendants' motion for summary judgment and denying the plaintiff's motion for summary judgment, judgment is hereby entered against the plaintiff and in favor of the defendants. Each side shall bear its own costs.

/s/ ....
Patrick E. Higginbotham
United States District Judge

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-37

PLACID OIL COMPANY,
Plaintiff-Appellant,

vs.

THE FEDERAL ENERGY ADMINISTRATION AND
JOHN F. O'LEARY, ADMINISTRATOR
(Now the Department of Energy and
JAMES SCHLESINGER, Secretary of Energy),
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

(CA-3-77-1057-G)

(Argued: June 22, 1979 Decided: July 13, 1979)

A. B. CONANT, JR., Shank, Irwin, Conant, Williamson & Grevelle, Dallas, Texas, of Counsel; with whom Morgan, Lewis & Bockius, Washington, D.C., and Paul Hicks, Placid Oil Company, Dallas, Texas, were on the brief for the Plaintiff-Appellant.

DINA R. LASSOW, Department of Justice, Washington, D.C., with whom Barbara Allen Babcock, Assistant Attorney General, and C. Max Vassanelli were on the brief for the Defendants-Appellees.

Before MORGAN, BECKER and GEWIN, Judges.

PER CURIAM:

Having heard oral argument and after considering the record and briefs on this appeal, the court finds no reversible error and therefore affirms on the well-reasoned opinion of Judge Higginbotham. *See* 465 F. Supp. 1199.

No. 79-236

In the

Supreme Court of the United States

October Term, 1979

PLACID OIL COMPANY,

Petitioner,

v.

DEPARTMENT OF ENERGY, ET AL.,

Respondents.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Placid Oil Company hereby supplements its Petition for Writ of Certiorari filed herein on August 13, 1979.

REASON FOR SUPPLEMENT

This Supplemental Petition is filed to call the Court's attention to certain congressional actions which have taken place since the original Petition was filed. Sup. Ct. R. 24-5

CONGRESSIONAL ACTION

On September 7, 1979, the Senate of the United States adopted by voice vote, Amendment No. 535 to S. 1477, as follows:

> That the portion of Public Law 89-554 (80 Stat. 393), now codified as Section 706 of Title 5, United States Code, is amended by striking out the first sentence thereof and substituting therefor the following:
>
> > To the extent necessary to decision and when presented, the reviewing court shall decide all relevent questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. *There shall be no presumption that any rule or regulation of any agency is valid,* and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, *the court shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown.* Provided, however, that if any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution action for civil penalty shall have sustained the burden of proof normally applicable in such actions.
> >
> > (Emphasis added)

The bill, containing the above-quoted amendment, has been sent to the House of Representatives.

Prior to passage of this amendment by the Senate, it had been the subject of lengthy debate in the House of Delegates of the American Bar Association, at that group's Annual

Meeting in Dallas, Texas, in August, 1979. Like the Senate subsequently, the ABA went on record in support of the amendment. 65 ABAJ 1286 (Sept. 1979)

RELEVANCE OF THE CONGRESSIONAL ACTION

Placid's Petition, pending in this Court, argues that the Temporary Emergency Court of Appeals has imposed upon the regulated industry a burden, when attacking an agency order, rule, or regulation, which is virtually impossible to meet and which denies to the affected company or person effective judicial review. Placid demonstrates, in its Petition, that the order of which it complains, solely because of that burden and the limited review it affords, has been upheld by the courts below notwithstanding those courts' characterizations of the order as inconsistent with prior orders of the agency and the distinctions made by the agency as "not wholly satisfying," "slightly unfair," and "technical." Finally, Placid's Petition demonstrates that the standards of review which TECA has established for review of orders and regulations of The Department of Energy are more stringent even than those applied to other federal agencies.

The Senate's passage of the significant amendment quoted demonstrates that Placid's concern for the restoration of accountability to agency decision making is shared by a substantial portion of the members of Congress. Indeed, one of the sponsors of the amendment, Senator Bumpers of Arkansas, said:

> If there is an issue of public policy on which there is a broader consensus in this country, I do not know what it is. A glance at just a small portion of the mail coming into every Senator's office every day is justification enough for this Amendment. 125 Cong. Rec. S12147 (daily ed. Sept. 7, 1979)

Further, as the passage of this amendment makes abundantly clear, this problem of administrative accountability is perceived by others as well as Placid as significantly related to the procedural burdens placed upon parties complaining of governmental action. Even the opponents of the amendment were "not unsympathetic with [its] objective", (125 Cong. Rec. S12148 [daily ed. Sept. 7, 1979] [remarks of Sen. Kennedy]), but suggested that the courts themselves were taking care of the problem. For example, Senator Ribicoff, speaking against the amendment said:

> I think this Amendment is unnecessary. While it may have been true at one time that courts gave excessive deference to administrative agency expertiese, that certainly has not been true for the last few years. Appellate courts have not been hesitant to closely review and then overturn agency actions using the present standard for review, 125 Cong. Rec. S12151, (daily ed. Sept. 7, 1979)

Further, both Senator Bumpers and Senator Kennedy referred to a letter from Harvard Law School Professor Clark Byse, written in opposition to the amendment, in which he expressed the "impression that the courts have shifted or is [sic] in the process of shifting from the view that regulations are presumptively valid." 125 Cong. Rec. S12146 (daily ed. Sept. 7, 1979). Notwithstanding the views of Senator Ribicoff and Professor Byse, Placid respectfully suggests that, far from exhibiting a shift toward greater agency accountability, TECA, at least, over the eight years of its existence, has consistently required less accountability.

Placid certainly does not here suggest that this Court should preempt Congress and reverse the present legislatively imposed procedures and burdens. What Placid does respectfully suggest, though, is that this Court recognize and reverse judicially created standards of review which deny regulated persons meaningful access to the courts. Such a standard, Placid further suggests, is the "any rational basis" standard formulated and applied by TECA.

Placid respectfully submits that this Court should grant Placid's Petition for Writ of Certiorari and advise TECA of what has been recognized already by Congress and the American public — agency accountability is an idea whose time has come.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with the United States Supreme Court Rules 33(1) and 33(2)(a), true copies of the foregoing Supplemental Petition for Writ of Certiorari were mailed first-class air mail, postage prepaid, on this 12th day of October, 1979, to the following counsel for Appellees:

Dina Lassow
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A. B. Conant, Jr.

No. 79-236

In the Supreme Court of the United States

OCTOBER TERM, 1979

PLACID OIL COMPANY, PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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PLACID OIL COMPANY, PETITIONER

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-131) is reported at 600 F. 2d 813. The opinion of the district court (Pet. App. A-104 to A-129) is reported at 465 F. Supp. 1199. The final decision of the Federal Energy Administration (Pet. App. A-90 to A-98) is reported at 4 FEA Energy Management (CCH) para. 80,534 (1976 Decisions).

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1979. The petition for a writ of certiorari was filed on Monday, August 13, 1979. The jurisdiction of this Court is invoked under 15 U.S.C. 754(a)(1), incorporating 12 U.S.C. 1904 note.

QUESTIONS PRESENTED

1. Whether the Federal Energy Administration properly denied petitioner's application for an exception from the agency's mandatory petroleum allocation regulations.

2. Whether the district court correctly found that petitioner's constitutional challenge to FEA's "December 1 Rule" (10 C.F.R. 211.63) was not substantial.

3. Whether the district court correctly granted the agency's motion for summary judgment as to the statutory validity of the "December 1 Rule."

STATEMENT

In January 1974, the Federal Energy Administration ("FEA")[1] promulgated a regulation (known as the "December 1 Rule," see 10 C.F.R. 211.63) pursuant to its authority under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* ("EPAA"). This regulation provided that all supplier/purchaser relationships under contracts for sales, purchases or exchanges of domestic crude oil in effect on December 1, 1973, shall remain in effect for the duration of FEA's allocation program under the EPAA (Pet. App. A-105).[2]

Petitioner is an independent producer of crude oil and natural gas. On December 30, 1974, through a wholly-owned subsidiary, it purchased a refinery located at Port Allen, Louisiana. At the time this purchase was made, all

[1]Pursuant to the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7101 *et seq.*, and Exec. Order No. 12009, 42 Fed. Reg. 46267 (1977), the Department of Energy has succeeded to the FEA's functions and responsibilities for the administration of mandatory petroleum pricing and allocation regulations.

[2]The rule was later amended and now refers to contracts in effect on January 1, 1976. 10 C.F.R. 211.63 (see Pet. App. A-105).

of petitioner's crude oil production was committed to other companies, pursuant to the December 1 Rule. These commitments prevented petitioner from supplying crude oil to its Port Allen refinery and required the refinery to purchase crude oil from other sources (Pet. App. A-104 to A-106).

In December 1975, petitioner applied to FEA for an exception from the provisions of the December 1 Rule. Petitioner claimed that its inability to use its own crude oil production in the Port Allen refinery resulted in serious hardship and gross inequity. In April 1976, FEA concluded that exception relief was not warranted on either ground and denied the application (Pet. App. A-73 to A-89). Although FEA acknowledged that exception relief had previously been granted to small refiners with new or expanded refinery capacity who had relied on a particular source of crude oil, the agency found after a detailed analysis that petitioner's factual situation did not meet the criteria for relief established in these earlier decisions (*id.* at A-73 to A-79). The order was upheld on administrative appeal (*id.* at A-90 to A-98).[3]

Petitioner then instituted this action in the United States District Court for the Northern District of Texas to challenge FEA's denial of exception relief. Petitioner also alleged that the December 1 Rule was unconstitutional and exceeded the agency's statutory authority.

The district court upheld FEA's denial of relief (Pet. App. A-104 to A-130). The court held that the agency had not acted arbitrarily or capriciously, that it had reasonably distinguished the prior rulings on which petitioner relied, and that its decision was supported by

[3]Petitioner also filed a request for reconsideration of the appeal, but FEA determined that no need for reconsideration of its decision had been demonstrated (Pet. App. A-99 to A-103).

substantial evidence (*id.* at A-109 to A-126). The court also concluded that petitioner's claim that the December 1 Rule constituted an unconstitutional taking of property without just compensation was foreclosed by decisions of the Temporary Emergency Court of Appeals and thus did not constitute a substantial constitutional issue warranting certification to TECA pursuant to Section 211(c) of the Economic Stabilization Act, 12 U.S.C. 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. 754(a)(1) (Pet. App. A-126 to A-128). Finally, the court rejected petitioner's claim that the December 1 Rule was in excess of the agency's statutory authority (*id.* at A-128 to A-129).

The court of appeals affirmed per curiam on the basis of "the well-reasoned opinion of" the district court (Pet. App. A-131).

ARGUMENT

1. Petitioner claims (Pet. 13-21) that the district court applied an incorrect standard of review of FEA's decision because the court cited, among other things, a statement in *Basin, Inc.* v. *FEA*, 552 F. 2d 931, 934 (T.E.C.A. 1977), that " 'the [FEA] regulation should have been upheld if it had any rational basis to support it' " (Pet. App. A-109). Petitioner argues that the "any rational basis" test is an improper standard of review in the context of an agency decision that is alleged to conflict with prior agency decisions.

Petitioner's attempt to find an error of substance in the district court's choice of words is unpersuasive. First, the district court quoted and applied the statutory standard of review set forth in 12 U.S.C. 1904 note, which provides in pertinent part that "no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the

agency's authority, or is based on findings which are not supported by substantial evidence." See Pet. App. A-109. The district court then proceeded to analyze in detail the distinctions that FEA had found between this case and the prior cases relied on by petitioner (*id.* at A-112 to A-126), and it expressly concluded that those distinctions were "neither arbitrary nor irrational nor unsupported by substantial evidence" (*id.* at A-126; see also *id.* at A-121, A-123).

As petitioner notes, the district court also cited a number of decisions of the Temporary Emergency Court of Appeals describing the standard of review of FEA orders denying exception relief in terms of whether the agency's decision had a "rational basis." But those decisions merely reflect the general and correct proposition that

> [t]he necessity of making "rough accommodations" to implement and effectively administer the "complex program necessary to deal with the petroleum industry" has warranted "special attention" by this court to the rule of deference when it is faced with reviewing agency action which grants or denies exception relief to parties based on a case-by-case determination of the effect of the application of agency regulations to that party.

Powerine Oil Co. v. *FEA*, 536 F. 2d 378, 385-386 (T.E.C.A. 1976).[4]

2. Section 5(a) of the EPAA provides that if a district court, in any action commenced under that statute,

[4]Petitioner does not directly challenge the district court's conclusion that FEA rationally distinguished its prior rulings. The court's conclusion is plainly correct for the reasons stated in its thorough opinion (Pet. App. A-113 to A-126).

determines that a "substantial constitutional issue" exists, it must certify that issue to the Temporary Emergency Court of Appeals. Petitioner claims (Pet. 21-23) that the district court erred in finding insubstantial its claim that the December 1 Rule is an unconstitutional taking of property without just compensation.

The district court correctly held that petitioner's claim was not substantial because it had been squarely rejected by previous decisions of TECA. In *Condor Operating Co.* v. *Sawhill*, 514 F. 2d 351, cert. denied, 421 U.S. 976 (1975), and *Basin, Inc.* v. *FEA*, 552 F. 2d 931 (1977), the court of appeals held that the December 1 Rule does not constitute an unconstitutional taking of property, but rather is a temporary and permissible suspension of usual property prerogatives to meet a national emergency. Petitioner argues (Pet. 22-23) that the court's reasoning in *Condor* is no longer applicable because the creation of the Department of Energy[5] shows that the December 1 Rule is no longer a temporary measure but instead is "a long continuing response to chronic energy problems." *Condor Operating Co.* v. *Sawhill*, *supra*, 514 F. 2d at 362. Petitioner's argument overlooks the fact that under Section 18 of the EPAA, 15 U.S.C. 760g, the President's authority to issue petroleum price and allocation regulations will terminate on September 30, 1981. The establishment of DOE in October 1977 may have made the agency administering these regulations more permanent, but it did not change the temporary nature of the regulations themselves.[6]

---

[5]See note 1, *supra*.

[6]Petitioner's objection, which is only to the failure of the district court to certify its constitutional claim to the court of appeals, is insubstantial for an additional reason: even if the district court erred in failing to certify, petitioner had a full opportunity to present its claim to the court of appeals and did so. That court rejected the claim on the merits.

3. In *Condor* and *Basin*, the court of appeals upheld the statutory validity, as well as the constitutionality, of the December 1 Rule. The court discussed in detail FEA's reasons for issuing the Rule and the Rule's relationship to the nine statutory objectives of the EPAA. Nevertheless, although *Basin* was decided as recently as March 1977, petitioner contends (Pet. 23-25) that the district court erred in rejecting its statutory challenge to the Rule without giving it the opportunity to introduce evidence concerning changed circumstances in the petroleum industry that have allegedly eliminated the stautory justification for the rule.

Although the district court's reference (Pet. App. A-129) to petitioner's "negligible" chances of success on this point does not mirror precisely the standard for summary judgment in Fed. R. Civ. P. 56, the court's discussion of the claim, read in context, indicates that it summarily denied the claim on proper grounds. The district court recognized the limited role of the courts in reviewing FEA's regulations and the fact that "the December 1 Rule has been upheld [by TECA] against attacks virtually identical to that made here" (Pet. App. A-129). As the court of appeals stated in *Basin* (552 F. 2d at 938):

> In upholding Section 211.63, this Court expresses no opinion as to the wisdom or efficacy of the questioned regulation. The judiciary does not comprise a higher administrative board charged with determining what agency action would be in the best interest of the nation. In cases such as this one, once it is determined that a contested regulation is a rational attempt to effectuate the congressional policy, the inquiry must be closed.

Hence, the district court correctly found, and the court of appeals correctly affirmed its finding, that no material facts were in dispute because TECA had already held that the December 1 Rule is a rational and statutorily authorized implementation of congressional policy in the EPAA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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